Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

Print Post Approved PP: 234093/00011

How Do You Solve the Media Puzzle?

Thomas Jones, Sarah Godden and Lisa Lucak take a look at the report of the Independent Media Inquiry and critically review its recommendations including its justifications for reform.

On 28 February 2012 the Independent Inquiry into the Media, led by the Honourable Mr Ray Finkelstein QC, reported to the Commonwealth Government (the ***Report***). The inquiry was convened by the Minister for Broadband, Communications and the Digital Economy, Senator Conroy in response to calls for an investigation into the media; calls provoked, at least in part, by the News of the World phone hacking scandal.

The Report provides a detailed and scholarly analysis of the role of the media in Australia, and will inform analysis of media markets for some years to come, irrespective of whether its recommendations are adopted. The Report contains almost 500 pages of analysis of the economic, social and legal issues facing the media, and will therefore be a useful tool for both policy makers and industry regulators such as the Australian Competition and Consumer Commission (the ***ACCC***).

Despite its exclusive focus on news media, the Report (with some important differences) is broadly consistent with the approach taken by the Convergence Review (the final report of which was released on the date this article was submitted for publication).[1] In particular, it recommends regulation by function, rather than platform, and states that:

> *'[i]n the newly converged news media environment, it is neither practicable nor sensible to discuss regulation of print and online platforms in isolation from the regulation of television and radio.'*[2]

More controversially, the Report recommends the creation of a new statutory authority, the News Media Council, to regulate converged news media on all platforms. The Convergence Review did not support this recommendation.

The perceived problem

The Report identifies three major problems that it says existing regulation has failed to address:

- market failure;
- public distrust of the media; and
- direct harm to individuals.

Market failure

The Report concludes that market failure in the production and supply of news adversely affects democracy by potentially compromising informed debate on important political and social issues.

Market failure is an economic concept used to describe an inefficient allocation of resources, which may prevent a market operating in a way that benefits consumers. Market failure may occur for many reasons, including:

- structural aspects such as externalities associated with the production or consumption of goods and services;

1 Commonwealth of Australia, Convergence Review: Final Report, (2012).

2 The Hon R Finkelstein QC, Report of the Independent Inquiry into the Media and Media Regulation (the Report), (2012) 157.

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May 2012

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- the existence of natural monopoly; and
- the consumption of common property.

In a free market economy, market failure, among other things, is generally accepted to be a necessary pre-condition before government or regulators will intervene.

'[i]n the newly converged news media environment, it is neither practicable nor sensible to discuss regulation of print and online platforms in isolation from the regulation of television and radio.'[2]

The Report identifies several causes of market failure in relation to news, including:

- externalities;
- information asymmetry; and
- concentration of ownership of the mainstream news services.

These causes of market failure are explained below.

Externalities

Externalities arise when individuals or organisations do not bear the cost of the consequences of their actions on others (negative externalities) or when they do not obtain a commensurate reward when their actions generate a benefit to others (positive externalities). Externalities result in persons which do not bear the full cost of their actions over-allocating resources to activities, producing negative externalities and under-allocating resources to activities that produce positive externalities.

The Report asserts that the production of news generates 'external' benefits to society beyond the private benefits accruing to producers and consumers of news, that is, positive externalities. For that reason, the Report concludes that the harm caused when the press is not properly regulated extends far beyond direct consumers of news. It extends to the community as a whole, which relies on the media, among other things, for democracy to function properly. The existence of this externality is characterised by the Report as a classic form of market failure.[3]

Information asymmetry and information failure

The Report concludes that the markets for the supply and consumption of news are also prone to information asymmetry because consumers may not have sufficient information to evaluate the quality or accuracy of a news story. The general reader may have trouble determining the accuracy of the information provided, the reliability of sources quoted, and whether the relevant facts were interpreted objectively.

Concentration of ownership

The Report also asserts that concentrated ownership of the mainstream news services leads to market failure if the resultant market structure causes a lack of effective competition. This is particularly acute in rural and regional cities or towns with only one newspaper. Ownership concentration and imperfect competition can be detrimental to effectively functioning democracy if these conditions lead to:

- a lack of diversity in the views that are voiced;
- public opinion unduly influenced by a handful of media owners or journalists; and
- a decline in journalistic and editorial news standards in the absence of effective competition.

3 The Report, above n 2, 267.

Lack of trust in the media

The Report concludes that consumer trust in the print media, particularly, reporting of political issues is low. Many consumers, its asserts, believe that news is not reported accurately, that fairness and diversity is lacking and that newspapers have too much power. The Report maintains that distrust adversely affects society as a whole; '[a] free society cannot endure without a free press and the freedom of the press ultimately rests on... trust in its work.'[4]

The Report also identifies that distrust of the media is prevalent among politicians and political parties as well as the general public. It cites evidence where it maintains reporting of political issues has transgressed fundamental principles of fairness, accuracy and balance, in particular:

- bias in the reporting of government affairs;
- attempts to influence government policy by repetition of issues with little or no new information;
- commercially-driven opposition to government policy;
- selective use of opinions opposed to government policy;
- unfair pursuit of individuals based on inaccurate information;
- failure to separate news from comment;
- inappropriate use of expert and lay opinion; and
- excessive use of pejorative adjectives in reporting on opinions and issues with which the media outlet does not agree.

These are strong claims which, notwithstanding the obvious thoroughness of the Report, involve a significant exercise of judgement on the part of the authors of the Report.

Individual harm

Somewhat less controversially, the Report concluded that news media, through, unreliable or inaccurate reporting, breaches of privacy, and failure to properly consider the defenceless in the community, can directly cause harm to individuals and organisations.[5]

The proposed solution

Is online different?

The Report draws attention to what are described as the special problems with online publications. The Internet is 'a medium which is largely unmanaged and uncontrolled',[6] essentially allowing almost anyone to publish their views.[7]

The Report suggests that if there is going to be continued regulation of the media, it is inappropriate to apply different standards to material published online and offline.

The failure of self-regulation?

The Report notes that ordinarily the preferred regulatory option of an industry including the media is self-regulation.[8] However, in the case of newspapers, self-regulation by a code of ethics and through the Australian Press Council (APC) has, according to the Report, proven ineffective. The reasons given for this include the characteristics of the industry identified above under 'market failure', and in particular widespread distrust of the media. According to the Report, doing nothing would simply perpetuate a self-regulation system that is only marginally effective and has not adequately measured up to community standards.[9]

The Report therefore makes two major recommendations.

The News Media Council

The first, and most controversial recommendation, is the establishment of an independent statutory body called the News Media Council, to take over the functions of the APC and some functions of the Australian Communications and Media Authority. The News Media Council would:

- enforce standards of conduct based on existing codes developed by the media or in consultation with the media, including non-binding aspirational principles and more detailed standards, with minimum standards of fairness and accuracy;
- regulate current affairs coverage on all platforms: print, online, radio and television;
- have statutory powers to investigate contraventions; and
- have the power to require a news media outlet to publish an apology, correction or retraction.

According to the Report, doing nothing would simply perpetuate a self-regulation system that is only marginally effective and has not adequately measured up to community standards.[9]

The Report cites the likely benefits of statutory regulation through the News Media Council as:

- an independent and transparent body charged with hearing complaints about wrongs perpetrated by the media;
- improved journalistic standards
- improved accountability of the media to its audience;
- timely and efficient treatment of complaints; and
- enhanced flow of information.

The Report and the final report of the Convergence Review make similar findings about the need for platform-neutral regulation of news content and standards in journalism. However, the reports differ primarily in the way they approach the question of the degree of regulation. While the Convergence Review agrees with 'much of the analysis and some of the findings of the Independent Media Inquiry' in its final report, it 'recommends an approach based on an industry-led body for news standards' rather than a statutory body.[10] Despite the significance difference in the nature of the regulatory body, the fact that both reports recommend platform-neutral regulation of news and commentary suggests that aspect of the recommendation could be adopted in some shape or form.

At first blush, the ability of the proposed News Media Council to develop standards of conduct and investigate contraventions of those standards and order the publication of corrections seems similar to the ACCC's power to issue infringement notices. Both processes hand significant power to the regulators to determine if there has been a breach of a legal standard, and to impose penalties on entities in breach; a function traditionally given to the judiciary and later extended to tribunals and other quasi-judicial bodies. While the proposed power of the regulator would be subject to judicial review, which is generally available in respect of decisions of that kind, some will argue it is another example of a regulator being 'judge, jury and executioner'.

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4 Twentieth Century Fund, A Free and Responsive Press: The Twentieth Century Fund task force report for a national new council (Century Foundation Press, 1979) 3.

5 The Report, above n 2, section 9.

6 The Report, above n 2, 283.

7 Any remaining doubt about this has been removed by the High Court judgment in Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 (20 April 2012).

8 The Report, above n 2, 209.

9 The Report, above n 2, 285.

10 Commonwealth of Australia, Convergence Review: Final Report, (2012) 153 (Appendix I).

Productivity Commission Review
The second major recommendation in the Report is that, within two years, the Productivity Commission conduct an inquiry into the health of the news industry and whether there is a need for government support. The Report also recommends that the inquiry consider the policy principles on which any such support should be given to both maximise effectiveness and eliminate any chance of political patronage or censorship.[11] This recommendation offers the government an opportunity to defer making any significant decisions on the state of the media industry and provides an easy 'out'; ordering a further inquiry.

The Report has also been criticised for not providing sufficient or compelling evidence to justify increased regulation.

Other recommendations
The Report also makes a number of other recommendations for future action, including:

- monitoring the adequacy of news services in regional areas;
- providing more funding to the Community Radio Content Development Fund (administered by the Community Broadcasting Foundation) to assist community radio stations in local regional communities to establish and maintain a news website dedicated primarily to the reporting of local news;
- strengthening the news capacity of the ABC in the event that a gap emerges in investigative and public service journalism from reduced efforts of newspapers and other media;
- creating incentives for private and philanthropic investment in news, such as allowing philanthropists to claim a tax deduction for a portion of donations for the establishment of new not-for-profit news ventures and funding of their operations;
- providing subsidies to investigative and public interest journalism; and
- subsidising the professional development of journalists by providing education funding. An example given by the Report is the establishment of a Centre for Investigative Journalism at a tertiary institution, or as a collective scheme at several tertiary institutions.

Given the varying roles the media must fulfil, it is unsurprising that some of these recommendations seem at odds with the hard-core economic rationale for reform based on market failure identified elsewhere in the Report.

Response

The response by journalists to the Report has been generally negative, with a number of common criticisms.

Erosion of the 'fourth estate'
One of the recurring criticisms is that the proposed News Media Council, would be Government-funded. Many in the industry maintain that the media – and particularly the news media – must be allowed to remain entirely independent of Government if it is to fulfil its function of questioning and challenging political decisions and public processes. Government funding of an industry regulator would, it is argued, limit the media's power to fulfil this mandate and is inconsistent with the notion of a free press.

Perhaps unsurprisingly, many journalists believe that instead of creating a new regulator, the existing APC should remain. They argue that the APC has successfully represented the interests of the public in acting on complaints but could be made more effective with better funding.

Lack of evidence
The Report has also been criticised for not providing sufficient or compelling evidence to justify increased regulation. The Report draws on a range of polls and reports which indicate that the public no longer holds the media in high regard. Journalists have responded that there is no evidence that public esteem of the media is lower now than it has been in the past.

Regulation of online content
The proposed extension of regulation to online media has also been subject to criticism. The proposed threshold at which online news sites, including blogs, become subject to scrutiny by the News Media Council is 15,000 hits per year. This threshold is criticised as arbitrary and as clearing the way for government-funded action against amateur website operators who comment on news and current affairs and who generate as few as 42 hits per day. In contrast, the Convergence Review proposed that a threshold for regulation of media organisation is set initially at 500,000 monthly users and specifically intended to exclude user-generated content including blogs.[12]

A positive response
While most commentary on the Report has been negative[13], there have been several positive responses which argue that the Report has successfully provided for the establishment of an informed, unbiased third party regulator, which will likely improve news media.[14] These commentators argue that the proposed News Media Council is not intended to increase the power of the government or impose some form of censorship, rather it is intended to make the news media more accountable, to those covered in the news and to the general public.

Conclusion

While the Report's recommendations may be controversial, they clearly reflect a great deal of thought and consideration of evidence on the part of the authors. The recommendations should therefore be given careful consideration, particularly in a world where convergence of platforms and media surely makes the challenge of self-regulation even greater than it was in a traditional print media world. Of course, Government-funding brings risks, but regulators such as the Australian Securities and Investments Commission and the ACCC provide ample evidence that independence can be preserved if the Government chooses to go down that path.

The Report's recommendations will need to be considered with the recommendations made by the Convergence Review. However, the coincidental timing of the two reports should not mean that the Convergence Review simply supersedes the Report before adequate attention is given to it by regulators, the industry and the public. Analysis of both reports should lead to a measured and thoughtful policy response to the future regulation of the media in a converged and information-hungry world.

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An earlier version of their article 'How do you solve the media puzzle' can be found on the Corrs website at http://www.corrs.com.au/publications/corrs-in-brief/finkelstein-report-how-do-you-solve-the-media-puzzle.

11 `The Report, above n 2, 11.

12 Convergence Review Final Report above n 1, 12.

13 'Separation is Crucial', The Mercury, 3 March 2012; David Crowe, 'Media Fears for Freedom as Watchdog Unleashed', The Australian, 3 March 2012; 'Media Inquiry a Case of Bad Regulation' The Australian Financial Review, 5 March 2012; Jennifer Oriel, 'Truth Falls Victim to Finkelstein', The Australian, 28 March 2012.

14 Sam North, 'Finkelstein's 'monster' not so big and scary', The Sydney Morning Herald, 13 March 2012; Rodney Tiffem, 'Media Review Gets Unfairly Bad Press', The Australian Financial Review, 20 March 2012; Joel Fitzgibbon, 'Finkelstein's Media Proposals are Modest and Sensible', The Australian, 22 March 2012.

Face Recognition Privacy in Social Networks under German Law

Yana Welinder examines the Hamburg Data Protection Agency's forthcoming action to show how the German Federal Data Protection Act regulates automatic face recognition in social networks.

One November day, a college student—let's call him "Andy"—was walking to his locker when he was approached by a researcher. The researcher asked Andy to participate in a study to try to find his Facebook profile based on three photos of his face. Andy was intrigued—not least because he had already deleted his Facebook profile picture from his account. As a senior and soon to enter the job market, he was concerned about the countless embarrassing status updates and photos he had posted during his college years. After taking three photos of Andy, the researcher asked him to fill out an online questionnaire. Clicking through to the last page of the questionnaire, Andy was stunned to find his entire Facebook profile on the screen, with his name, in a big black font, next to Facebook's blue default avatar.

This remarkable study was conducted by researchers at Carnegie Mellon University "to show that it is possible to start from an anonymous face in the street, and end up with very sensitive information about that person."[1] The study exemplified how the vast amount of personal information in social networks can be misused to essentially place a nametag on each individual as she walks around in public. While Facebook introduced face recognition technology on its website around the same time as this study was conducted, the researchers did not use Facebook's technology.[2] Instead, they used publicly available face recognition technology and photos that could be viewed on Facebook without logging in.[3] When combining these two resources, they were able to identify roughly one of three participants in only a few seconds.[4] They could even identify "Andy" despite the fact that he had no profile picture because he was "tagged" in his friends' photos.[5]

The recent developments in face recognition technology are what the 1983 German Constitutional Court would describe as the "pressure of the modern information use" upon an individual's right of self-determination—more specifically, an individual's right to decide whether to remain anonymous in public.[6] The constitutional "right of informational self-determination" is at the heart of the German Federal Data Protection Act, which the Hamburg Data Protection Agency recently alleged Facebook to be violating.[7] This article first discusses Facebook's face recognition technology to illustrate how such technology can connect an otherwise anonymous face to personal information in social networks. It then focuses on the Hamburg Data Protection Agency's forthcoming action to show how the German Federal Data Protection Act regulates automatic face recognition in social networks. Finally, this article analyses the relevant choice of law and jurisdiction provisions to explain why the Hamburg Data Protection Agency can threaten legal action against Facebook for the violation of German law.

The constitutional "right of informational self-determination" is at the heart of the German Federal Data Protection Act, which the Hamburg Data Protection Agency

I. Face Recognition Technology and Facebook

A. Brief Overview of the Technology

Face recognition technology aims to combine the superior human perception skills with the immense memory capacity of computers. Humans recognize other individuals visually based upon their appearances—focusing on facial features—and by using other senses, such as smell, hearing, and sometimes touch.[8] They also greatly rely on "context," such as an individual's clothing style, the surrounding people, the environment, and geographic location.[9] But while recognition is a natural human skill, the human brain can only memorize a limited number of faces.[10] Computers, on the other hand, can process and remember a vast amount of facial features to recognize many more people.[11] Qualitatively, however, computers do not compare to human recognition because they are still unable to combine visual recognition with other human senses and lack "contextual knowledge."[12]

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1 Alessandro Acquisti, Ralph Gross, and Fred Stutzman, Faces of Facebook: *Privacy in the Age of Augmented Reality,* Heinz College, Carnegie Mellon University, available at http://www.heinz.cmu.edu/~acquisti/face-recognition-study-FAQ/ (last visited Apr. 25, 2012), video presentation of research from the 2011 Black Hat Briefings Technical Information Security Conference available at http://www.youtube.com/watch?v=fZQ7Th9L5ss (last visited Apr. 25, 2012). While this study was able to find a Facebook profile for an individual who did not have a profile picture, the other facts in the story about "Andy," as well as his name, are purely fictional.

2 *Id.*

3 *Id.*

4 *Id.*.

5 *Id.*

6 Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination,* 37 Am.J.Comp.L. 675, 687 (1989).

7 Id. at 675; Press Release, Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit, Facebook's Biometric Database Continues to be Unlawful (Nov. 10, 2011) ("Hamburg DPA November 10 Press Release"), available at http://www.datenschutz-hamburg.de/uploads/media/PressRelease-2011-11-10-Facebook_BiometricDatebase.pdf (last visited Nov. 14, 2011).

8 Wenyi Zhao & Rama Chellappa, Face Processing: Advanced Modeling and Methods 8-9 (Elsevier Academic Press 2006).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

Generally,[13] automatic face recognition starts with measuring facial features of individuals that have already been identified in photos.[14] These measurements—which make up their unique "biometric data"—are then compiled into a "biometric database."[15] Face recognition technology is then applied to a new photo to find a face and detect its features.[16] The face is then "normalized," which entails transforming its scale, position, and light, and sometimes converting it into a gray-scale image.[17] The technology then measures the facial features in the photo and compares the resulting biometric data to the previously compiled database to identify the newly detected face.[18]

Facebook's photo collection contained around 100 billion photos by mid-2011 and was estimated to have increased by 6 billion photos each month.

The accuracy of automatic face recognition depends upon factors such as the exact methodology of the process described above, the number of available photos when creating the database, the quality of the photos, and the visibility of individuals within those photos.[19] Though early face recognition technologies could barely recognize a single face from a frontal view, technologies have now been developed to identify individuals in groups of people within images taken from diverse angles.[20] The CMU study discussed above showed that the photos available on Facebook, without so much as logging in, are sufficient to identify college students on a campus with approximately 30 percent success rate when using publicly available face recognition technology.[21]

B. Information Processed by Facebook's Photo Tag Suggest

In December 2010, Facebook introduced a new feature—called the "Photo Tag Suggest"—which uses face recognition technology and previously "tagged" photos to find users in newly uploaded photos.[22] While Facebook collects and retains a great deal of information about its users, this article focuses on the information that implicates face recognition technology.[23] That includes not only photos from which biometric data is extracted, but also all information displayed on a Facebook profile because, as explained below, by "tagging" a photo, the Photo Tag Suggest generates a hyperlink to the user's profile and all the information therein.

A Facebook profile contains a host of information about each user. Initially, Facebook "require[s a new user] to provide [her] name, email address, birthday, and gender."[24] Though not required, the user is also prompted to provide her religious belief, political views, and sexual orientation.[25] As the user goes through the process of friending other users (who may already be her friends, class mates, family, or colleagues offline), Facebook also retains a list of those friends.[26] A vast amount of communication between a user and her friends is also retained as the user makes "status updates," comments on friends' "walls," sends private messages, or chats with friends in real time.[27] Some of the personal information retained by Facebook is displayed on a user's profile and is visible to other users by default, unless the user changes her "privacy settings" to specify that the information should be visible to "friends only" or specific individuals.[28] Many users, however, do not understand or use these privacy settings.[29]

Facebook further collects photos uploaded by users and information about facial features when the users identify ("tag") themselves or others in those photos.[30] Facebook's photo collection contained around 100 billion photos by mid-2011 and was estimated to have increased by 6 billion photos each month.[31] According to Facebook, its users provide "more than 100 million tags" per day to that photo collection.[32] The uploaded photos may also provide Facebook with metadata, including the "time, date, and place" of a photo.[33] If a user uploads a photo from a mobile phone, Facebook may also know that user's physical location at that very instant.[34]

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13 Given the many different technologies that have developed in this field (A. Abate et al., *2D and 3D Face Recognition: A Survey,* 28 Pattern Recognition Letters 14 (2007)), the description of the technology here is intended only as a general overview of the most basic steps in the face recognition process.

14 Stan Z. Li & Anil K. Jain, Handbook of Face Recognition 2-3 (Springer 2005).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 Zhao & Chellappa, supra note 8, at 10.

20 *Id.* at 10-11.

21 Acquisti, Gross, & Stutzman, supra note 1.

22 Justin Mitchell, *Making Photo Tagging Easier,* The Facebook Blog, June 30, 2011, https://www.facebook.com/blog.php?post=467145887130 (last visited Nov. 12, 2011).

23 *Facebook Data Use Policy: Information We Receive and How It is Used,* Facebook, https://www.facebook.com/about/privacy/your-info#inforeceived (last visited Nov. 9, 2011).

24 *Id.*

25 Facebook, https://www.facebook.com (last visited Apr. 28, 2012).

26 *Id.*

27 *Id.*

28 Facebook Data Use Policy: Sharing and Finding You on Facebook, Facebook, https://www.facebook.com/about/privacy/your-info-on-fb#controlpost (last visited Nov. 9, 2011).

29 Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook,* 16 (2006), presented at Proceedings of Privacy Enhancing Technologies Workshop (PET) (finding that "among current members, 30% claim not to know whether FB grants any way to manage who can search for and find their profile, or think that they are given no such control"), available at http://privacy.cs.cmu.edu/dataprivacy/projects/facebook/facebook2.pdf (last visited Feb. 12, 2012).

30 Facebook Data Use Policy: Information We Receive and How It is Used, *supra* note 23.

31 *Facebook Photo Trends [INFOGRAPHIC],* Pixable (Feb. 14, 2011), http://blog.pixable.com//2011/02/14/facebook-photo-trends-infographic/ (last visited Nov. 24, 2011).

32 Mitchell, *supra* note 22.

33 Facebook Data Use Policy: Information We Receive and How It is Used, *supra* note 23.

34 *Id.*

Facebook's Photo Tag Suggest implicates all of the personal information in a user's profile because it connects facial features detected in newly uploaded photos to that user's profile with a hyperlink. Users can manually tag a person in photos by marking a square around the person's face and providing the person's name. Once tagged, the name appears when hovering with the mouse over the tagged face in the photo. The name is also listed next to the photo as a hyperlink to the person's profile if she has a Facebook account. That profile may contain personal information, including email address, phone number, birthday, gender, religious belief, political views, sexual orientation, and countless personal status updates. The information in a user's profile may or may not be visible to a person clicking on the hyperlink depending on the selected privacy settings. Unless a user specifically opts out of being automatically identified in photos, Facebook uses tagged photos of that user to identify the user in newly uploaded photos.[35] Having identified the user, Facebook then suggests to the person uploading the photo that she tag the identified user in the photo, which results in a new hyperlink to the identified user's profile.[36]

Facebook's restriction that only a user's friends can use the Photo Tag Suggest to automatically identify her in photos does not necessary protect the user from abuse by automatic face recognition. In authoritarian countries, in particular, commentators have reported instances of dissidents being tortured to disclose their social network passwords.[37] The result is that behind another dissident's social network contact may be the very person this dissident needs most protection against. Even in democracies, there have been instances of schools, colleges, and employers demanding users' passwords to screen future employees and monitor students.[38] And for users who have some social network friends that they do not personally know offline, there is a risk that those friends are actually "socialbots."[39] A socialbot is software that is designed to behave like a human user and connect with users to inter alia gather their personal information.[40] Thus, for example, if a socialbot operator could get access to hundreds of college students' profiles, she could mirror the CMU experiment discussed above and instead use Photo Tag Suggest to identify those students on campus. She could then use elements of their offline and online activities to create elaborate identity theft schemes.[41]

II. Germany v. Facebook - Face to Face

When the Photo Tag Suggest was launched in Europe in June 2011 it provoked an immediate privacy outcry in the media.[42] Gerard Lommel, the Luxembourg member of the European Article 29 Data Protection Working Party, responded that there would be an investigation into its legality.[43] Further, the Hamburg Data Protection Commissioner Johannes Caspar argued that Photo Tag Suggest violates the EU Data Protection Directive and the German Federal Data Protection Act because it processes photos without obtaining specific consent from users.[44] He therefore demanded that Facebook bring the Photo Tag Suggest into compliance with the law or disable it.[45]

the Hamburg Data Protection Commissioner Johannes Caspar argued that Photo Tag Suggest violates the EU Data Protection Directive and the German Federal Data Protection Act because it processes photos without obtaining specific consent from users

In September 2011, Facebook entered into negotiations with the German federal government to sign a voluntary code of conduct regarding its privacy practices.[46] According to the Hamburg Data Protection Agency, Facebook initially considered a function that would make users aware of the Photo Tag Suggest and ask them to provide specific consent.[47] While it is unclear whether the Hamburg Data Protection Agency would have approved this solution, Facebook subsequently abandoned it and its negotiations with the federal government broke down.[48] On October 21, 2011, Mr. Caspar told Agence France-Presse that the agency would file an action against Facebook unless it proposed satisfactory changes to the Photo Tag Suggest by November 7th.[49] Facebook responded by proposing "a checkbox for users to accept terms and conditions

35 *Id.*

36 *Id.*

37 Adrian Blomfield, *Syria 'tortures activists to access their Facebook pages',* The Telegraph, May 9, 2011, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/8503797/Syria-tortures-activists-to-access-their-Facebook-pages.html (last visited Feb. 16, 2012).

38 See, e.g., ACLU-MN files lawsuit against Minnewaska Area Schools, American Civil Liberties Union of Minnesota, Mar. 6, 2012, http://www.aclu-mn.org/news/2012/03/06/aclu-mn-files-lawsuit-against-minnewaska-area-schools (last visited Mar. 16, 2012); Bob Sullivan, *Govt. Agencies, Colleges Demand Applicants' Facebook Passwords,* MSNBC, Mar. 6, 2012, http://redtape.msnbc.msn.com/_news/2012/03/06/10585353-govt-agencies-colleges-demand-applicants-facebook-passwords (last visited Mar. 16, 2012).

39 John P. Mello Jr., *'Socialbots' Invade Facebook: Cull 250GB of Private Data,* PCWorld, Nov. 2, 2011, http://www.pcworld.com/article/243055/socialbots_invade_facebook_cull_250gb_of_private_data.html (last visited Feb. 11, 2012).

40 Id.

41 See, e.g., David D. Clark & Susan Landau, *Untangling Attribution,* in Proceedings of a Workshop on Deterring CyberAttacks: Informing Strategies and Developing Options for U.S. Policy (2010), available at http://www.cs.brown.edu/courses/csci1950-p/sources/lec12/ClarkandLandau.pdf (last visited Mar. 20, 2012).

42 Mitchell, *supra* note 22.

43 Stephanie Bodoni, *Facebook to be Probed in EU for Facial Recognition in Photos,* Bloomberg BusinessWeek, June 8, 2011, http://www.businessweek.com/news/2011-06-08/facebook-to-be-probed-in-eu-for-facial-recognition-in-photos.html (last visited Nov. 12, 2011).

44 Press Release, Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit, Gesichtserkennungsfunktion von Facebook verstößt gegen europäisches und deutsches Datenschutzrecht (Aug. 2, 2011), available at http://www.datenschutz-hamburg.de/news/detail/article/gesichtserkennungsfunktion-von-facebook-verstoesst-gegen-europaeisches-und-deutsches-datenschutzrech.html?tx_ttnews%5BbackPid%5D=170&cHash=b9607e92ef91d779f308acd01b7dd639 (last visited Nov. 14, 2011).

45 *Id.*

46 Press Release, Bundesinnenminister und Facebook verständigen sich auf stärkeren Schutz der Nutzer, Bundesministerium des Innern (Sept. 8, 2011), http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2011/09/facebook.html (last visited Nov. 14, 2011).

47 Hamburg DPA November 10 Press Release.

48 *See Id.*

49 *Germany Warns Facebook over Face-Recognition App,* Google News, Oct. 21, 2011, http://www.google.com/hostednews/afp/article/ALeqM5h6OE6S_Z3Noataserm-_OvN6bu9w?docId=CNG.4274462d8bc1dc67622b983a5b20b6da.171 (last visited Nov. 14, 2011).

and guidelines on data usage."[50] Mr. Caspar, however, remained unimpressed. First, he argued that "these guidelines on data usage [would not sufficiently] inform users about the face recognition function and the biometric database."[51] Second, the proposed consent would only be provided upon registration and would not apply to the over 20 million existing German Facebook members.[52] In a press release, Mr. Caspar announced that the agency was preparing an action to remedy Facebook's breach and to "ensure that new face recognition technologies [in the] future [are] implemented in a way that respects users' right of privacy and informational self[-]determination."[53]

Privacy is a firmly rooted concept under German law, which has developed a constitutional fundamental right to "informational self-determination."

To evaluate Mr. Caspar's argument that the Photo Tag Suggest violates the German Federal Data Protection Act, this article briefly reviews the EU Data Protection Directive as implemented by this Act and then analyzes the relevant provisions of the Act. This analysis will show that there is a strong argument that Photo Tag Suggest violates the Act by collecting biometric data and using it with other personal information, such as user names, contact information, and interests, without first obtaining users' informed and unambiguous consent.

A. The German Federal Data Protection Act Implements the EU Data Protection Directive

The European Union ("EU") requires "free movement of goods, persons, services and capital" between its member states to maintain an open internal market—which in turn necessitates free movement of data.[54] To facilitate free movement of personal data while protecting individuals' fundamental right to privacy, the EU sought to harmonize the national privacy protection laws in its member states.[55] The result was the EU Data Protection Directive ("Directive").[56] This Directive requires member states to enact legislation imposing procedural requirements upon the "automatic" processing of "personal data."[57] If a member state fails to enact national legislation to effectively "transpose" (i.e. implement) the Directive within three years, the Directive becomes "directly effective" within that state, allowing individuals to pursue an action against the state pursuant to the Directive.[58]

B. How Could the Photo Tag Suggest Violate German Law?

Privacy is a firmly rooted concept under German law, which has developed a constitutional fundamental right to "informational self-determination."[59] As early as in 1977, Germany adopted the Federal Data Protection Act ("BDSG")[60]—which has been praised as "the most perfectionist system of data privacy in the world."[61] As applied to face recognition technology, the BDSG likely requires that individuals give informed consent before their biometric data is collected or used and specific consent if particularly sensitive information is involved in the processing.

1. Users' Knowledge and Consent

The BDSG requires Facebook to seek users' written and informed permission for the "collection, processing and use of [their] personal data."[62] "Personal data" is "any information concerning personal or material circumstances of an identifiable or identified natural person."[63] The consent must be a "free decision" based upon information regarding the intended use of the information and, when appropriate, "the consequences of withholding consent."[64] Significantly, when consent is provided along with other written terms, it must be "distinguishable in its appearance."[65] Consent is not required, however, if the personal data is "generally accessible" and Facebook collects it merely for its "own commercial purposes." Even then, however, consent may still be required if the user "has a clear and overriding legitimate interest in [preventing the] processing or use."[66]

By applying the Photo Tag Suggest to photos, Facebook processes and uses personal information about individuals—such as their photos and names. Further, to the extent that the biometric data extracted

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50 Lucian Constantin, *Germany Prepares to Sue Facebook Over Facial Recognition Feature,* PC World, Nov. 11, 2011, http://www.pcworld.com/businesscenter/article/243612/germany_prepares_to_sue_facebook_over_facial_recognition_feature.html (last visited Nov. 14, 2011).

51 Hamburg DPA November 10 Press Release, supra note 47.

52 *Id.*

53 *Id.*

54 Directive 1995/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Recital 3, 1995 O.J. (281) 31 (EC), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF (last visited Nov. 11, 2011).

55 *Id.*, Recital 9.

56 It is important to note that this Directive is in the course of being superseeded by an EU Data Protection Regulation that would be directly applicable in the EU Member States. Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final, (Jan. 25, 2012), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf (last visited Mar. 14, 2012).

57 European Parliament and Council Directive 95/46, *supra* note 54, Art. 3 and 4.

58 Case C-41/74, Van Duyn v Home Office, 1974 E.C.R. 1337; see also Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Sep. 5, 2008, 2008 O.J. (C115) 47 ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods").

59 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) (Federal Contitutional Court) Dec. 15, 1983, Neue Juristische Wochenschrift [NJW] 419, 1983 (Ger.).

60 Bundesdatenschutzgesetz [BDSG, Federal Data Protection Act], Dec. 20, 1990, BGBl. I at 2954, as amended Sept.14, 1994, BGBl. I at 2325, all subsequent quotations refer to an English translation of the Act available at http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/BDSG_idFv01092009.pdf?__blob=publicationFile (last visited Dec. 1, 2011).

61 Schwartz, *supra* note 6, at 688; Inga Markovits, *Selective Memory: How the Law Affects What We Remember and Forget About the Past,* 35 L. & Soc'y Rev. 513, 522-523 (2001).

62 BDSG, §§ 4(1) and 4a(1).

63 *Id.* § 3(2).

64 *Id.* § 4a(1).

65 *Id.*

66 *Id.* § 28(1)(3).

from collected photos can be distinguished from those photos, Facebook is arguably also "collecting" new personal information. All of these actions require users' consent. It could be argued that consent is not required because users' tagged photos are already "generally accessible" and Facebook is processing them for its own purposes. However, many photos uploaded to Facebook have restricted access by virtue of privacy settings such that they would likely not be considered "generally accessible." Even for photos without restricted access, Facebook's interest in avoiding the consent requirement would be balanced against the users' interest in preventing the processing or use of the data. Given the possible intrusive uses of biometric data to identify users without their knowledge, that balancing may weigh in favor of requiring consent.

Second, one could imagine that the users' failure to opt out of the Photo Tag Suggest by adjusting their privacy settings constitutes implied consent to the collection and use of biometric data. However, the ability to opt out is insufficient for this purpose because the privacy settings for the Photo Tag Suggest do not look any different than the other privacy settings and thus are not "distinguishable in [their] appearance." Moreover, the Article 29 Working Party has opined that a user's failure to change the default settings in a social network should not constitute consent to a data use.[67] Rather, "[c]onsent must be given prior to the start of processing activities or before any new use of the data" so that users can make an "informed choice."[68] Opt-out consent is particularly flawed with respect to automatic face recognition because by the time a user opts out, the data has already been collected and potentially used to identify the person in new photos.

Significantly, Facebook has not actively notified its users that all of their personal information and biometric data derived from any photo in which they are tagged would be used to identify them in new photos. But when Facebook obtained personal information from users, it was required to inform them of "the purposes of [the] collection, processing or use."[69] This likely means that users should know specifically what biometric data is collected and from what photos. They should also know how long the data will be stored and who will have access to it in the meantime. Facebook further needs to explain in detail how it will aggregate and process the data and who will have access to the end results.

2. Collection of Biometric Data from Friends' Photos

What about when Facebook extracts a user's biometric data from photos uploaded by the user's friends? The BDSG tries to address that situation by requiring companies like Facebook to collect personal data directly from the user.[70] Yet Facebook may still collect data for its "commercial purpose" without the user's "participation" if (1) the data is "generally accessible";[71] or (2) if collecting it directly from the user would be too burdensome.[72] Crucially, data must nevertheless not be collected without the user's participation if there is a possibility that "overriding legitimate interests of the [user] would be adversely affected."[73]

It is hard to rationalize the collection of biometric data from friends' photos based on the premise that it would be too burdensome to obtain from the user. If the user makes it difficult for Facebook to collect biometric data from her own photos—by never uploading photos where her face can be identified or pixelating her photos so that Facebook's Photo Tag Suggest cannot extract biometric data from them—there is a possibility that the user has an "overriding legitimate interest" in maintaining anonymity.[74]

when consent is provided along with other written terms, it must be "distinguishable in its appearance

The more difficult question is whether biometric data from friends' photos can be considered "generally accessible." While the BDSG does not define the term "generally accessible" with respect to this exception, elsewhere in the statute the term is defined as data that "anyone can use, with or without prior registration, permission or the payment of a fee."[75] Clearly, friends' photos with restricted privacy settings would not qualify because they are not available to people without Facebook registration and even most of the users. However, photos without restricted privacy settings can be accessed by anyone. Indeed, the CMU researchers were able to use such photos without logging onto Facebook to identify roughly every third participant in the study mentioned above. However, even if such photos would be considered "generally accessible," Facebook's interest in using friends' photos to identify a person in new photos would be balanced against that person's interest in not being identified. On balance, the person's privacy interest may again outweigh Facebook's commercial interest because of the possible intrusive uses of biometrics—particularly as Facebook would still be able to use this data after seeking its users' permission.

3. Specific Consent When Facebook Is Used for Political Discourse

Facebook may also be required to obtain specific consent from users that provide particularly sensitive information on their profiles. For use of certain personal data, such as "political opinions," "religious or philosophical beliefs," and "sex life," the BDSG requires users to give prior consent that specifies the particular information in question.[76] Without specific consent, such data may only be processed if the company uses it "for [its] own commercial purposes [and the user] has manifestly made [it] public."[77] Facebook has enabled users to state their religious beliefs, political views, and sexual orientation in their profiles. To the extent that users chose to provide such information and do not make it "public" through their privacy settings, specific consent may be required before Photo Tag Suggest can generate hyperlinks to this information. Further, a user's failure to adjust the default settings perhaps would not be considered a "manifest" act to make that sensitive information "public." Therefore, the BDSG may require specific consent even if a user does not restrict access to the sensitive information she posts on her profile.

Continued on Page 28

67 Press Release, European data protection authorities clarify the notion of consent (Jul. 14, 2011) http://ec.europa.eu/justice/policies/privacy/news/docs/press_release%20opinion_on_consent_14072011.pdf (last visited Nov. 30, 2011); Opinion of the Article 29 Data Protection Working Party, 2011 O.J. (L 1197) 24, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf (last visited Nov. 30, 2011).

68 *Id.*

69 BDSG, § 4(3). The notice must also provide (1) the identity of the person collecting the data and (2) the "categories of recipients" when the user does not expect the data to be "transferred to such recipients." *Id.*

70 *Id.* § 4(2).

71 *Id.* § 28(1)(3).

72 *Id.* § 4(2).

73 *Id.* §§ 4(2) and 28(1).

74 Adam Harvey, *CV Dazzle Camouflage from Computer Vision,* http://www.cvdazzle.com/ (last visited Mar. 15, 2012); Andrew W. Senior and Sharath Pankant, *Privacy Protection and Face Recognition* in Handbook of Face Recognition, *supra* note 14, at 681.

75 BDSG, § 10(5).

76 *Id.* §§ 3(9) and 4a(3).

77 *Id.* §§ 3(9), 4a(3), 4d(5), and 28(6)(2).

Reversal of the 'Optus Tv Now' Decision: Triumph for the AFL, NRL and Telstra?

Tureia Sample provides an update on the outcome of the appeal to the Full Federal Court in the Optus TV Now proceedings.

The landmark Optus TV Now proceedings[1] have taken a dramatic turn recently with the Full Court of the Federal Court of Australia unanimously finding in favour of the AFL, NRL and Telstra on appeal.[2]

The Optus TV Now litigation is an Australian first for cloud technology and the 'private and domestic' time-shifting exception under s 111 of the *Copyright Act 1968* (Cth) (the ***Copyright Act***). The TV Now service is a cloud-based subscription service which allows users to record free-to-air television programs (including AFL and NRL matches) and replay them back on a compatible device (namely PCs, Apple devices, Android devices and 3G devices). At the heart of the dispute is the ongoing conflict between innovation in the consumer electronic communications industry and the protection of copyright investment by the entertainment industry.

the TV Now system was 'designed in a way that makes Optus the main performer of the act of copying'

At first instance, Justice Rares of the Federal Court ruled in favour of Optus. He found that the TV Now service did not infringe copyright as the subscribers were the 'makers' of the copies and such copying was made within the exception in s 111 of the Copyright Act.

On appeal by the AFL, NRL and Telstra, Justices Finn, Emmett and Bennett of the Full Court considered two primary issues:

1. Who makes the copy, Optus or the subscriber or both?[3]
2. If Optus is the 'maker', can Optus rely on the s 111 time shifting exception?

Who is the maker?

The question of 'who makes the copies of programs' was the pivotal issue on appeal. In essence, the Full Court held that the copies were either made by Optus or by Optus and the subscriber acting together and therefore being 'jointly and severally responsible' for the recording. It was unnecessary for the Full Court to express a definitive view.

The Full Court found that Optus utilised very sophisticated technology whereby Optus set up the system, sold the service, used the system to record the program (in four formats), stored the recording, and then streamed it on demand to subscribers. Although the TV Now system was highly automated, the Full Court found that Optus' role in the process was so pervasive that Optus could not be disregarded when the person who makes the copy needs to be identified.[4] In a nutshell, the TV Now system was found to be a 'service provision' analogous to a commercial photocopier which copies copyright material provided to it.

Interestingly, Justices Finn, Emmett and Bennett adopted language of a recent Japanese decision[5] and stated that the TV Now system was 'designed in a way that makes Optus the main performer of the act of copying'.[6] The Full Court rejected 'volitional conduct' concepts used in US[7] and Singaporean[8] jurisprudence (which were relied upon by Justice Rares) and expressly stated that such any adoption in Australia would require a 'gloss to be put on the word 'make' in s 86(a) and s 87(a) and (b) of the Copyright Act'.[9]

Can Optus rely on the s 111 exception?

The Full Court found that Optus could not rely on the s 111 exception. Their Honours ruled that the copying by Optus was commercial in nature (in that Optus captures, copies, stores and makes programs available for later viewing for reward[10]) and that s 111 was not intended to cover 'commercial copying on behalf of individuals'.[11] Although not explicitly discussed in the judgment, this conclusion by the Full Court is further supported by the fact that the Copyright Act contains over 100 sections that expressly use the words 'on behalf of' but notably these words are absent in s 111.[12]

In addition, the Full Court also stated that Optus' liability was not secondary in nature (which would otherwise be dependent upon the primary liability of a subscriber). But rather, Optus itself is primarily and severally liable as the person who did the acts of copying.

The Future

So in this second round of the TV Now dispute the AFL, NRL and Telstra have triumphed. The result has been welcomed by copyright owners. But what does it mean for future innovation and consumer access to digital services? Unsurprisingly, Optus (which has now sus-

1 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012).

2 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012).

3 This question requires a construction of s 86(a) and s 87(a) and (b) of the Copyright Act.

4 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) [67]

5 *Rokuraku II,* First Petty Bench of the Supreme Court, Japan, 20 January 2011.

6 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) [19].

7 For example, *Cartoon Network, LP v CSC Holdings, Inc,* 536 F 3d 121 (2nd Cir, 2008).

8 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

9 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) [20].

10 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) [22].

11 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) [26]

12 The majority of references to 'on behalf of' are in 'Division 2 – Copying and communication of broadcasts' (particularly various forms of s135). Other sections include: computer programs (s47), archives and libraries (ss50, 51, 51AA, 110A), technological protection measures (s132), circumvention devices (s116), applications to Copyright Tribunal (s153), modifications to copyright ownership (ss179 and 196), educational purposes (s200), groundless threats (s202 and 202A) and performer's protection (s248).

pended the TV now service) lodged an appeal to the High Court of Australia on 10 May 2012.[13] In the course of its decision, the Full Court gave two signals on where the law may head in this area.

The first was its departure from the interpretative approach which influenced Justice Rares decision (and which were evident in the US case[14] and Singaporean case[15] upon which he relied). Rather than adopting a 'technologically neutral interpretation' and 'interpretation informed by legislative policy', Justices Finn, Emmett and Bennett approached the complex issues from a strict statutory interpretation standpoint. The Full Court indicated (or perhaps hinted) that it is up to Parliament, not the judiciary, to take account of countervailing issues and to consider any extension or amendment to s 111.

The second signal was the acknowledgement at the end of the Full Court's decision that: '[w]e accept that different relationships and differing technologies may well yield different conclusions to the 'who makes the copy' question.'[16]

The Full Court was clearly seeking to confine its findings to the express facts before it and was contemplating that alternative private copying technologies or future technological advances could emerge which do not breach copyright provisions.

Given the high stakes for both sides of the litigation, the intense lobbying that has ensued followed the dispute and the explosion of media and political debate on the issue, this match is far from over.

Tureia Sample is a Senior Lawyer at the Special Broadcasting Services Corporation. This paper expresses only the author's personal opinions.

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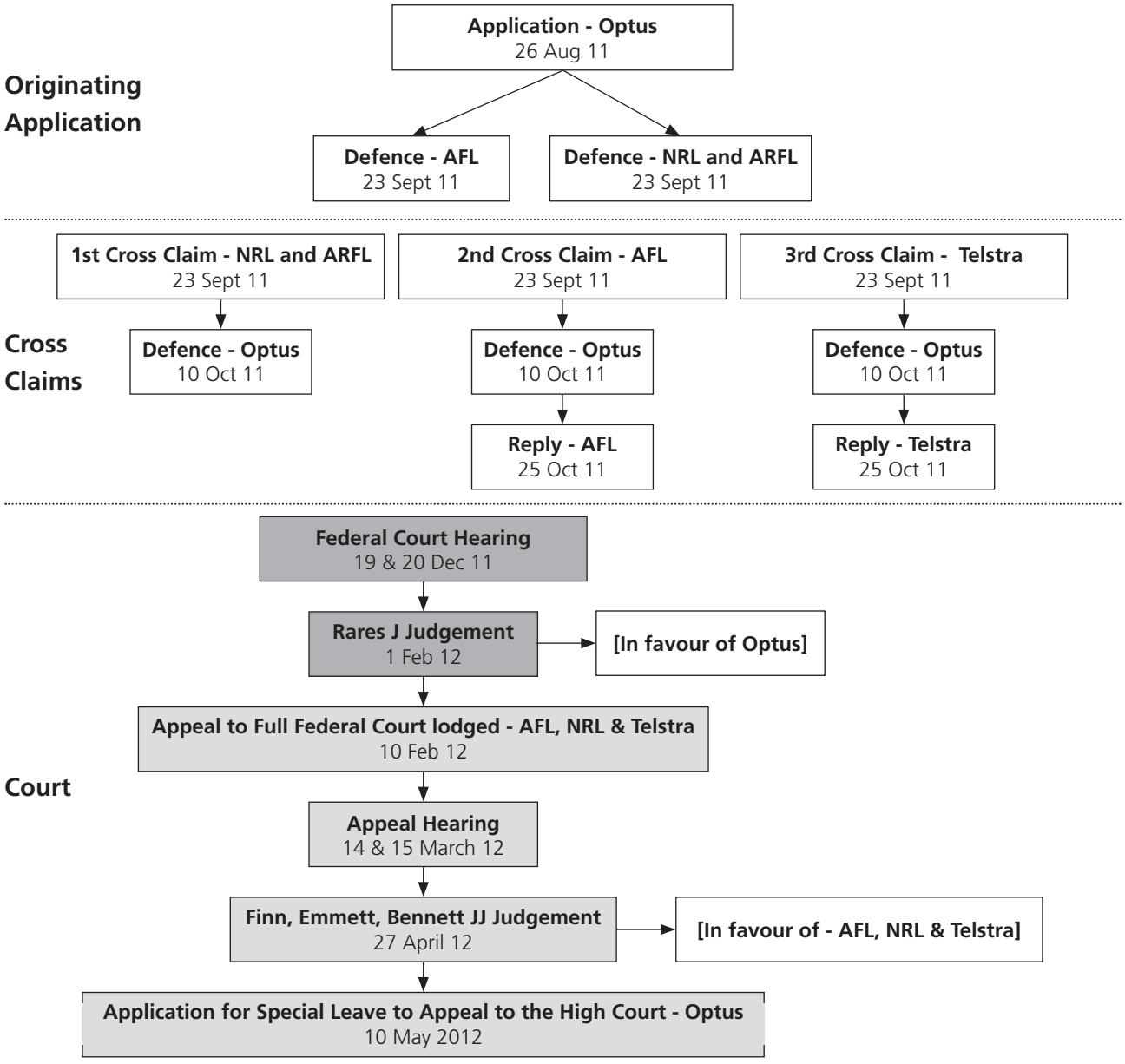
13 Singtel Optus Pty Ltd, 'Application for Special Leave to Appeal' S116 and S 117 of 2012, High Court of Australia, (Sydney Registrry), 10 May 2012. See generally, Julian Lee, 'Optus appeals web broadcast decision', *The Age* (Melbourne), 10 May 2012.

14 *Cartoon Network, LP v CSC Holdings, Inc,* 536 F 3d 121 (2nd Cir, 2008).

15 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

16 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012) [29]

TIMELINE OF OPTUS TV NOW PROCEEDINGS



Convergence Review: Wide-Ranging Reform on the Horizon

Ian McGill provides a snappy overview of the Convergence Review Committee's much-anticipated final report and discusses the reforms and the potential implications for media and communications industry participants.

The Convergence Review (the ***review***) was established in early 2011 by the Federal Government, to assess the policy and regulatory frameworks that apply to the increasingly converged media and communications landscape in Australia. The review's scope was determined by Terms of Reference set by the Government.[1]

The review's final report (the ***report***) presents the review's findings, and provides thought provoking and considered recommendations to the Federal Government in relation to media and communications delivery platforms and content.

several relevant areas still need to be integrated into a coherent convergent regulatory regime, particularly copyright reform and the anti-siphoning scheme

The report also considers and integrates the recommendations made by two other reviews that ran parallel to the Convergence Review and reported to the Federal Government in February this year: the Independent Inquiry into the Media and Media Regulation, undertaken by the Hon Ray Finkelstein QC (the ***Finkelstein Inquiry***); and the National Classification Scheme Review, *Classification – Content Regulation and Convergent Media* (the **Classification Review**), undertaken by the Australian Law Reform Commission.

Despite the broad scope of findings articulated in the report, several relevant areas still need to be integrated into a coherent convergent regulatory regime, particularly copyright reform and the anti-siphoning scheme. The report refers to the anti-siphoning scheme, but understandably falls short of making any detailed recommendations on that highly political regime, noting that it was recently the subject of a government review. The report does state, however, that the new communications regulator would administer any future anti-siphoning scheme and recommends a full review on the scheme within five years.[2] Since the report has been released, a Senate Committee has recommended that a Bill to amend the scheme be passed by Parliament with minimal amendments)[3]. The legislation may well continue its legislative passage when Parliament sits in June this year.

This article steps through the background and context of the review, and considers the proposed reforms and some of the key implications for industry participants.

Regulatory focus

In a significant departure from the existing regulatory regime, the report considers that the focus of regulation should be on significant enterprises that control professional media content, irrespective of the platform that they use to deliver such content. The report, accordingly, proposes a concept of content service enterprises (***CSEs***), which would broadly refer to organisations that have:

- control of professional content they deliver;
- a large number of Australian users; and
- a high level of Australian-based revenue derived from supplying that professional content to Australians.

The precise thresholds applicable to CSEs would be set by the new statutory regulator, though the report recommends that the initial threshold for users be 500,000 per month and that the threshold for revenue be $50 million a year of Australian-sourced content revenue only. Although existing online providers (such as Telstra, Google and Apple) are unlikely at present to meet these thresholds, this may not be the case in the future.

The report has added the requirement of 'professional' content to the criteria specified in the interim report and confirms that it does not intend to focus on user-generated content published on social media sites. The report did note, however, that platforms that host user-generated content could be classified as a CSE where they have financial arrangements with professional content providers; for example, revenue-sharing advertising arrangements. Even though the platform operator does not have direct editorial control over the program, the report proposes that the financial arrangement may constitute control over the content.[4]

Who would regulate?

The report recommends the establishment of two new bodies that will regulate the media and communications industry:

- a new statutory regulator that would replace the ACMA; and
- an industry-led body to oversee journalistic standards for news and commentary (the news ***standards body***).

A new statutory regulator

The report recommends that a new statutory regulator (the ***regulator***) be established immediately that enabling legislation is passed. The regulator would commence work on the concepts that will underpin the framework (including the CSE thresholds referred to above). Once the proposed phasing out of the broadcasting licence

1 Commonwealth of Australia, *Convergence Review Terms of Reference,* http://www.dbcde.gov.au/__data/assets/pdf_file/0019/133381/Convergence-Review-Terms-of-Reference.pdf.

2 Commonwealth of Australia, *Convergence Review Final Report,* p. 35.

3 See the Broadcasting Services Amendment (Anti-siphoning) Bill 2012 and the Report of the Senate Environment and Communications Legislation Committee dated May 2012.

4 Above n 2, 11.

the report considers that the focus of regulation should be on significant enterprises that control professional media content, irrespective of the platform that they use to deliver such content

regime has been completed, the regulator will replace and assume the remaining functions of the ACMA.

The regulator would be independent and operate at arm's length from the Government. Significantly, ministerial control of the regulator would be only through disallowable legislative instruments, not general directions. This differs from the existing framework, which gives the Minister an unfettered power to give the ACMA directions in relation to its non-broadcasting and non-online content functions.[5]

The report recommends that the regulator take the form of a statutory corporation managed by a board that has full power to act within the constraints of the law. The regulator would have broad powers to make rules (subject to ministerial direction in limited cases only). The regulator would, nonetheless, be held accountable for its decisions under existing parliamentary, judicial and administrative arrangements; for example, disallowance by Parliament, merits review by the Administrative Appeals Tribunal and judicial review. The report floats the suggestion that the regulator could also be supervised by a joint parliamentary committee, which would operate in a similar manner to the Parliamentary Joint Committee on Corporations and Financial Services.

The report also recommends that the existing practice of cross-appointments on a part-time basis between the regulator's and the ACCC's boards continue.

Following the Classification Review's excellent recommendations, the regulator would be responsible for the new national classification scheme for media content standards applying across all platforms, and also incorporate a new Classification Board.[6]

The regulator would also be granted specific new powers in relation to:

- *CSEs* – responsibility for threshold classifications, administering the media ownership tests, and monitoring compliance with Australian and local content standards;
- *content standards* – discretion to determine standards, complaints and investigation proceedings, as well as direct enforcement powers in response to breach of codes or standards; and
- *competition* – rule-making and investigative powers where content-related competition issues are identified, complementing ACCC functions and powers.

News standards body

The report recommends the establishment of an independent self-regulatory news standards body with responsibility for the content standards that apply to news and commentary across all platforms (not just traditional print media). The news standards body would develop and enforce a code aimed at promoting fairness, accuracy and transparency in professional news and commentary.[7] The body would absorb the functions currently performed by the Australian Press Council and also the ACMA (but only in relation to news and commentary).[8]

CSEs would be required to be members of the body, though other professional news and commentary providers would be encouraged to opt in to membership. National broadcasters would not be required to join the news standards body but should take into account the standards and procedures developed by this body in formulating their own codes.

Significantly, the report considers that membership could be a condition of retaining legal privileges currently provided for news and commentary in federal legislation. The board of the new body would comprise a majority of directors who are independent of members.[9]

The report recommends that the regulator take the form of a statutory corporation managed by a board that has full power to act within the constraints of the law

The recommended formulation of an industry body to oversee the development and application of the news and commentary standards sits in contrast to the Finkelstein Inquiry, which recommended a statutory authority as the appropriate body for these purposes. The report considers that a statutory authority should be an option of 'last resort'.[10]

Although industry-led, the new body would nonetheless have a range of remedies and credible sanctions available to it, including requiring members to publish findings on particular media platforms.[11] It would also be able to refer serious breaches of the code to the regulator.[12] Likewise, the regulator would be able to refer matters for investigation to the news standards body.[13]

The majority of funding for the body should be contributed by its members; however, the Government would also contribute funding to meet a shortfall or to fund specific projects.

Media ownership

The report recommends the following three key changes in relation to media ownership.

Reformulation of 4/5 rule

The existing 'minimum number of voices' or '4/5' rule, which requires there to be no fewer than five media operators or groups

5 The report notes that, rather than increasing the resources required to regulate the industry, the arrangements proposed, including the removal of the broadcast licensing regime and duplication in the classification scheme, should free up existing regulatory resources. Ibid, xiii.

6 Ibid, 38.

7 Ibid, 30.

8 Ibid, xiv.

9 Ibid, 51.

10 Ibid, 37.

11 Ibid, 51.

12 Ibid, 38.

13 Ibid, 37.

The report recommends that the regulator be given the power to conduct market investigations where potential content-related competition issues are identified.

in a metropolitan commercial radio licence area, and no fewer than four in a regional area, should be amended to 'minimum number of owners'.[14]

The regulator would administer the rule and be able to provide exemption in circumstances in the public interest (which would generally be in relation to availability of services and content). The existing concept of a 'commercial radio licence area' would be removed and the geographic scope of the new local areas determined by the regulator.

New public interest test

The report recommends the introduction of a public interest test to apply to proposed changes in control of CSEs that are of national significance.[15] The regulator would have the power to block such transactions that are not in the public interest.

The regulator would define the criteria for 'national significance', but a minimum threshold should be provision of content service in multiple markets and more than one state or territory.[16] Other likely determinants would be a minimum audience threshold (also to be determined by the regulator), and whether the content service enterprise has a controlling interest in one or more prominent media operations on different platforms.

The public interest test is intended to sit alongside, rather than cut across, the role and powers of the ACCC in relation to changes of control.[17]

Abolition of existing rules

The report recommends the abolition of the following current rules:[18]

- the '2 out of 3' rule applying to commercial television, radio, newspapers;
- the 'one-to-a-market' rule applying to commercial television;
- the 'two-to-a-market' rule applying to commercial radio; and
- the '75 per cent audience reach' rule for commercial television.

Content

Content-related competition issues

The report considers that, without regulatory intervention, content could become a 'new competition bottleneck' for the industry.[19] Particular areas of risk identified in the report include exclusive access to premium content, the bundling of carriage and content services, network neutrality, the provision of unmetered content and the re-transmission of free-to-air signals.

The report accordingly recommends that the regulator be given the power to conduct market investigations where potential content-related competition issues are identified. The report envisages that the regulator's powers to promote competition in content markets would complement the ACCC's existing powers to deal with anti-competitive conduct. Such powers would only be exercisable following a public inquiry.

Production and distribution of Australian and local content

The report highlights the need for continued support for Australian programs. In line with this objective, the report recommends a new uniform content scheme that abolishes the existing set of measures based on quotas and minimum expenditure. Under the proposed scheme, CSEs that offer professional television-like drama, documentary or children's content, and meet certain audience and revenue thresholds, would be required to contribute to the production of Australian content by either investing a percentage of their Australian market revenue in those genres or contributing to a central converged content production fund.[20]

The converged fund is a key production support measure and would also be funded by government appropriations and spectrum fees paid by broadcasters.[21] The existence of the investment and contribution options recognises that content providers should be able to choose whether they support Australian content directly or indirectly.

The converged fund is a key production support measure and would also be funded by government appropriations and spectrum fees paid by broadcasters.

The report also addresses the need for continued provision of local content services for the benefit of people living in regional and rural Australia.[22] In particular, commercial free-to-air television and radio broadcasters will be required to devote a specified amount of programming to material of local significance. To assist with these obligations, the report recommends that a more flexible reporting regime be implemented and the removal of current radio 'trigger event' rules.[23]

The report recommends transitional arrangements that should apply in the run-up to the commencement of the uniform content scheme, including a 50 per cent increase in Australian sub-quota obligations for drama, documentary and children's content to reflect their digital multichannels.

The report argues that this increased obligation to invest during the transition period recognises the existing concessions granted to the free-to-air sector, including an ongoing option to access spectrum, access to the higher 40 per cent producer offset, no full fourth commercial television broadcasting network and the protection of sports rights in the anti-siphoning list.[24]

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14 Ibid, 18.

15 Ibid, xvi.

16 Ibid, 24.

17 Ibid.

18 Ibid, xvii.

19 Ibid, 28.

20 Ibid, 66.

21 Ibid, 72.

22 Ibid, 79.

23 Ibid.

The report recommends a technology-neutral and flexible approach to media content standards, which would be administered by the regulator

Content standards

The report recommends a technology-neutral and flexible approach to media content standards, which would be administered by the regulator. CSEs would be subject to children's television content standards and content standards in relation to other areas where regulatory intervention is required, with existing codes registered under the *Broadcasting Services Act 1992* (the ***BSA***) to be used as a starting point.

Content providers that do not meet the threshold requirements of CSEs would be encouraged to opt in to compliance with such codes, or to develop their own codes.

The report also includes the findings from the review of Schedule 7 to the BSA, which is required under a statutory review provision in that Act. The key recommendation based on these findings is that, consistent with the review and the Classification Review, Schedule 7 to the BSA should be replaced by a new national classification scheme that would harmonise the regulation of content across all media platforms.

Spectrum issues

The report recognises that the existing approach to the provision of broadcasting licences is inconsistent with the principle that 'the government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services'.[25]

The report accordingly recommends the removal of the broadcasting licence regime. Existing apparatus licences would be replaced by renewable, fully tradeable 15-year spectrum licences, to be administered under the *Radiocommunications Act 1992* (Cth). The spectrum licence would be conditional on the provision (using that spectrum) of digital TV on one or more channels. There would be no other restrictions on the kinds of services that could be provided over the spectrum.

Consistent with the trend towards market-based approaches to spectrum, these spectrum licences would be fully tradable; that is, multi-channels could be leased or sold to a new content service provider. Licences would be subject to market-based pricing – an annual spectrum access fee would be payable based on the value of the spectrum as planned for broadcasting use.

Interestingly, the report recommends a degree of competition protection in relation to the sixth 'multiplex' (previously known as the sixth channel), which it suggests should not be allocated to a commercial broadcaster but be used for new and innovative services. The sixth multiplex could be operated as a consortium under similar arrangements already operating for digital radio services.

The report also recommends that there would be ministerial powers to reserve and allocate spectrum for policy objectives considered important by the Government and the Australian community.

What next?

Without enacting legislation, none of the recommendations will have immediate binding impact on the industry. At this stage it is not clear which, if any, of the recommendations will be acted on or how the Government will respond to the proposed reform agenda the review has set for it. In fact, the Government is not required to accept the recommendations or even respond to the report. The Minister has flagged the Government's desire to formally enter the reform conversation and the *Australian Financial Review* has reported that a response from the Government is expected mid-year.[26]

The Federal Opposition has said it will carefully examine the report and participate in public debate about the changes it proposes.[27]

It is not yet clear whether stakeholders will be offered by the Government a formal opportunity to make submissions in response to the report. As the Minister predicted, however, there is already 'robust public debate' about the recommendations.[28]

At the very least, the report is a highly desirable and long-overdue chance to reflect on and implement a regulatory, policy and legislative framework that befits a converged media and communications environment in Australia.

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24 Ibid, 70.

25 Ibid, .90.

26 Ben Holgate, 1 May 2012, *The Australian Financial Review,* Networks slam new media rules – http://www.afr.com/p/national/networks_slam_new_media_rules_qYQUY4bZ6M0NvdIcQUT55N.

27 Malcolm Turnbull, 30 April 2012, *Convergence Review: More Regulation & Government Intrusion* – http://www.malcolmturnbull.com.au/media/convergence-review-more-regulation-government-intrusion/.

28 Senator Stephen Conroy, 30 April 2012.

Back Into the Open Sea -
US Appellate Court Sends Viacom V Youtube Safe Harbour Case Back to Trial

Henry Fraser examines the Viacom v Youtube decision and considers its potential implications for carriage service providers In Australia.

Introduction

The US case of *Viacom v. YouTube* concerned the US 'safe harbor' exemption from liability for copyright infringement by online service providers (***OSPs***).[1] This article provides a brief summary of the case before offering a few comments on the liability of carriage service providers in Australia for the copyright infringements of their customers.

1. Background

The safe harbor provisions of the US Digital Millennium Copyright Act 17 U.S.C (***DMCA***) apply not only to carriage service providers, who provide access to the internet, but also to online service providers (***OSPs***), such as search engines.

The red flag test posits that mere knowledge of the general prevalence of an infringing activity conducted on or through the OSP's service is not enough to deny the protection of the safe harbour.

§512(c) of the DMCA applies to infringements by an OSP that arise 'by reason of the storage at the direction of a user' of material that resides on a system or network controlled or operated by or for the OSP. An OSP will not be liable for monetary or injunctive relief in respect of such an infringement if the OSP:

(a) does not have 'actual knowledge' of the presence of the infringing material (§512(c)(1)(A)(i));

(b) is not 'aware of facts and circumstances that would make infringing material apparent' (§512(c)(1)(A)(ii));

(c) acts expeditiously upon obtaining such awareness of knowledge to take down allegedly infringing material (§512(c)(1)(A)(iii));

(d) does not obtain a direct financial benefit from the infringing activity in circumstances where it has the 'right or ability to remove or control' such activity (§512(c)(1)(B)0;

(e) acts expeditiously to take down allegedly infringing material upon receiving notice of infringements in a prescribed form (§512(c)(1)(C) and §512(c)(3)); and

(f) has designated an agent to receive notices of infringement §512(c)(2), and provided contact details for the agent to the public online and to the US Copyright Office.

A notice from a rights-holder that is not in a prescribed form is not taken into account in determining whether an OSP has actual knowledge of infringement or awareness of facts and circumstances making infringement apparent.

2. Facts

In the present case, two separate claims were heard together. In one claim the plaintiffs included Viacom International, Inc., Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation and Black Entertainment LLC. In the other claim, there were also numerous high-profile plaintiffs including the Football Association Premier League Limited and the Fédération Française de Tennis.

The plaintiffs in each suit claimed that YouTube, Inc., YouTube LLC and Google, Inc (together ***YouTube***) had infringed their copyright both directly and vicariously by reproducing, publicly performing and displaying approximately 79,000 audiovisual 'clips' in which the plaintiffs owned copyright.

YouTube moved for summary judgment that it was entitled to the protection of the §512(c)(1) safe harbor. The plaintiffs cross-moved for summary judgment that the YouTube was not entitled to the safe harbour protection because:

(a) YouTube had actual knowledge of their users' infringement, and were aware of facts and circumstances from which infringing activity was apparent;

(b) YouTube received direct financial benefit from the infringement and had the right or ability to control the infringing activity; and

(c) the infringement did not result solely from providing storage at the direction of the user.

3. Previous findings

At first instance, Judge Stanton of the District Court of the Southern District of New York found in favour of YouTube. His Honour held that YouTube's knowledge of infringements was not sufficient to require YouTube to take action before it received notice from the plaintiffs.[2]

His Honour relied heavily on the 'red flag' test advocated in the Senate Judiciary Committee Report that accompanied the introduction of the US safe harbour provisions.[3] The red flag test posits that mere knowledge of the general prevalence of an infringing activity conducted on or through the OSP's service is not enough to deny the protection of the safe harbour. Before an OSP is required to act to take down allegedly infringing material there must be a specific 'red flag' that puts the service provider on notice, or there must be notice in the prescribed form from a rights-holder.

Judge Stanton held that an OSP must have "knowledge of specific and identifiable infringements " in order to be considered to have 'actual knowledge' or 'awareness of facts and circumstances' that

1 *Viacom Int'l, Inc. v. YouTube, Inc.,* No. 10-3270-cv, 2012 WL 1130851 (2d Cir. Apr. 5, 2012)

2 *Viacom International, Inc. v. YouTube, Inc*., No. 07 Civ. 2103

3 Senate Judiciary Committee Report and the House Committee on Commerce Report, H.R. Rep. No. 105-551, pt. 2 (1998).

In Australian copyright law there is no safe harbour for OSPs.

would disqualify it from the protection of the §512(c)(1) safe harbour. Further, his Honour held that an OSP will not be considered to have the "right and ability to control" infringing activity for the purposes of the safe harbour unless it has 'item-specific' knowledge of infringements. His Honour affirmed that facts and circumstances are not 'red flags' if it would not be possible to identify material as infringing without further investigation of those facts and circumstances.[4] His Honour concluded that YouTube's general knowledge that infringement was ubiquitous did not impose a duty on YouTube to monitor or search its service for infringements as a condition of the §512(c)(1) safe harbour.

Judge Stanton also found that YouTube's replication, transmittal and display of infringing videos in providing the YouTube service was "by reason of the storage at the direction of a user", and therefore received safe harbour protection.

4. Decision on Appeal

The U.S. Court of Appeals for the Second Circuit, in a decision released on 5 April 2012, vacated Judge Stanton's decision and sent the case back to the U.S. District Court for the Southern District of New York for retrial.

The Court of Appeals held that Judge Stanton had correctly articulated the rule that actual knowledge or awareness of specific infringing activity is required before an OSP will be considered to have 'actual knowledge' or 'awareness of facts or circumstances' that would disqualify it from safe harbour protection under §512(c)(1). The Court explained that the test for 'actual knowledge' is a subjective one: whether the OSP has actual knowledge of infringing conduct or material. The test for 'awareness of facts or circumstances', it held, is partly objective and partly subjective: whether the OSP has *subjective* knowledge of facts and circumstances that would have made the specific infringement *objectively* obvious to a reasonable person. The Court also held that common concepts of willful blindness may assist in considering whether an OSP has 'awareness of facts and circumstances' for the purposes of the safe harbour.

Crucially, however, the Court of Appeal's view of the facts of the case differed from Judge Stanton's view. The Court decided that a reasonable jury could have found that YouTube did indeed have 'red-flag' knowledge or awareness of specific infringing activity. The court relied on evidence of reports by and emails between YouTube staff indicating an awareness of quite specific infringements of various plaintiff's copyright material (and indeed a willingness to persist in hosting videos known to be infringing). As it was not clear whether this awareness of specific infringement related to any of the clips in suit, the Court remanded to the District Court the questions of whether there was such specific awareness, and whether YouTube was willfully blind in relation to infringements.

The Court also held that Judge Stanton erred in his interpretation of the meaning of 'right and ability to control' infringing activity in the context of §512(c)(1)(B). The Court held that, to be considered to have such a right and ability, an OSP is not required to have item-specific knowledge of infringement. Further, the Court held that OSP's will not be excluded from the safe harbour merely because:

(a) they receive a direct financial benefit from infringing material; or

(b) they have the capacity to block access to infringing material.

Having made these comments on the interpretation of §512(c)(1)(B), the Court remanded to the District Court the question of whether the plaintiffs adduced sufficient evidence that YouTube had the right and ability to control infringement. The exact scope of §512(c)(1)(B) therefore remains unclear.

Finally, the Court upheld the trial judge's finding that three of four software functions involved in YouTube's replication, transmittal and display of infringing fall under the umbrella of infringement that occurs "by reason of" storage at the direction of the user, but remanded for further fact-finding the question of whether a fourth function also fell under that umbrella.

5. Comparison with Australia

5.1 Safe harbours in Australia

In Australian copyright law there is no safe harbour for OSPs. The safe harbour in Part V, Division 2AA of the *Copyright Act 1968*, applies only to carriage service providers (***CSPs***). Broadly, CSPs are providers of internet connectivity (rather than providers of services on the internet). There are however, four categories of activities protected by the Australian safe harbour, which closely reflect the categories in the US safe harbour. These are:

(a) transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections (Category A);

(b) caching copyright material through an automatic process (Category B);

(c) storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider (Category C); and

(d) referring users to an online location using information location tools or technology (Category D).

CSPs are not required to prove that they did not have knowledge of infringing material, or awareness facts and circumstances making infringement apparent

Category C is analogous to §512(c), and Categories A, B and D mirror §512(a), (b) and (d) respectively. The categories, effects and conditions of the Australian safe harbour are similar to those of the US safe harbour because the Australian safe harbour provisions were introduced to give effect to obligations under the Australia-United States Free Trade Agreement in 2004.

In Australia, if a CSP is protected by the safe harbour, a court cannot award damages, account of profits or other monetary relief against it. If the Category A safe harbour applies, the orders available to a court in respect of the CSP's safe harbour activity are limited to an order requiring a CSP to disable access to an online location outside Australia or to terminate a specified account. If the Category B, C, or D safe harbours apply, then the court has the option of making some other 'less burdensome, but comparably effective' order, as well as the orders that would be available for a category A activity.

The conditions of the Australian Category C safe harbour that correspond to those in §512(c)(1) are the requirements that a CSP:

(a) must act expeditiously to remove or disable access to copyright material residing on its system or network if the carriage service provider:

4 Inc.665 F. Supp 2d 1099, 1108 (C.D. Cal. 2009)

In Australia, if a CSP is protected by the safe harbour, a court cannot award damages, account of profits or other monetary relief against it.

(i) becomes aware that the material is infringing; or
(ii) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing;

(b) must expeditiously remove or disable access to copyright material residing on its system or network upon receipt of a notice in the form prescribed by the *Copyright Regulations 1969* that the material has been found to be infringing by a court; and

(c) must not receive a financial benefit that is directly attributable to the infringing activity if the carriage service provider has the right and ability to control the activity.

A CSP must also comply with a number of other conditions in order to qualify for the Category C safe harbour. The conditions are as follows:

(a) the carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers;

(b) if there is a relevant industry code in force--the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material;

(c) the carriage service provider must expeditiously remove or disable access to copyright material residing on its system or network upon receipt of a notice in a prescribed form that the material has been found to be infringing by a court; and

(d) the carriage service provider must comply with a prescribed procedure in relation to removing or disabling access to copyright material residing on its system or network.[5]

Certain aspects of the Australian safe harbour provisions also give legislative effect to the sentiment articulated in *Youtube v Viacom* that there is no positive duty in the US on OSPs to monitor their services for infringements. In Australia, CSPs are not required to prove that they did not have knowledge of infringing material, or awareness facts and circumstances making infringement apparent. Nor is a CSP required to monitor its service for infringements or to seek facts indicating infringing activity (except to the extent necessary to accommodate, and not interfere with, standard technical measures used to protect and identify copyright material) (s116AH(2)).

5.2 Mere conduit defence

The other close analogue to the US service provider safe harbour is the defence in ss 39B and 112E of the Australian *Copyright Act 1968* for a persons who merely provide a facility for making a communication, where the facility is then used to make an infringing communication. The mere conduit defence is interpreted narrowly in Australia. Any knowledge or notice of infringement will generally preclude reliance on the defence.[6]

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5 See *Copyright Act 1968*, s116AH, *Copyright Regluations 1969*, Part 3A.

6 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285; *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

FOXTEL Undertakings Allay ACCC's Competition Concerns Over AUSTAR Acquisition

Ross Zaurrini and Ben Teeger take a look at the recent decision by the ACCC not to oppose FOXTEL's acquisition of AUSTAR. This article considers the review of the transaction conducted by the ACCC, the court-enforceable undertakings proffered by FOXTEL and the implications for the subscription television services and telecommunications industries.

In brief

On 10 April 2012, the Australian Competition and Consumer Commission (***ACCC***) announced that it would not oppose FOXTEL Management Pty Limited's (***FOXTEL's***) acquisition of AUSTAR United Communications Limited (***AUSTAR***).

In the course of a lengthy merger review process, conducted by the ACCC , FOXTEL offered (and the ACCC accepted) a court-enforceable undertaking from FOXTEL. The undertaking, which secured regulatory clearance of the transaction, prevents FOXTEL from, among other things, obtaining certain exclusive content rights.

Proposed acquisition

On 26 May 2011, FOXTEL announced its proposal to acquire AUSTAR by way of a Scheme of Arrangement (***Scheme***).[1]

FOXTEL is Australia's largest subscription television services provider. It provides services to over 1.6 million households in predominately metropolitan areas of Australia. FOXTEL offers over 200 channels, ranging from news and documentaries, entertainment and movies, sport, music and children's programming. FOXTEL is ultimately owned by Telstra Corporation Limited (**Telstra**) (50%), News Corporation Limited (25%) and Consolidated Media Holdings Limited (25%).

AUSTAR is a subscription television services provider to over 750,000 subscribers in mainly rural and regional areas in Australia, as well as the Gold Coast, Darwin and Hobart. It listed on the Australian Securities Exchange in 1999. The majority shareholder of AUSTAR is Liberty Global, Inc (a Delaware Corporation).

When the proposed acquisition was announced, then FOXTEL CEO, Kim Williams AM, described the proposed Scheme as a 'win-win transaction that delivers value to AUSTAR shareholders, synergies and growth opportunities for FOXTEL and increased services and choice for all consumers'.[2] The proposed Scheme was valued at approximately $2 billion.

The transaction was formally entered into by the parties on 11 July 2011 and was subject to a condition precedent requiring approval by the ACCC.

ACCC review

Statutory and regulatory regime

While parties to a merger are not legally required to notify the ACCC, proceeding without regulatory approval risks the ACCC (or another interested party) seeking an injunction to prevent the transaction being completed, on the basis that it contravenes section 50 of the *Competition and Consumer Act 2010* (Cth) (***Act***).

The ACCC was concerned that because FOXTEL and AUSTAR are the only significant providers of subscription television services in Australia, the proposed merger would create a near monopoly subscription television provider across Australia.

Section 50 of the Act prohibits any acquisition of shares or assets that would have the likely effect of substantially lessening competition in any market in Australia. Whether or not a transaction is likely to have that effect will depend on factors such as:

- the likelihood that the acquisition will result in the acquirer being able to significantly increase prices;
- the likelihood that the acquisition will result in the removal from the market of a vigorous and effective competitor; and
- the dynamic characteristics of the market, including growth, innovation and product differentiation.

Where there is a material risk that a transaction raises competition concerns under the Act (and therefore the potential for regulatory interference from the ACCC) , merger parties typically seek clearance from the ACCC under its informal merger clearance process. That process is governed by the ACCC's Merger Guidelines[3] and process guidelines.[4] It typically involves the ACCC gathering information from the merger parties and interested market participants to

1 A Scheme of Arrangement is a commonly used method to transfer all of the shares in one company (the Target) to another company (the Acquirer). It is a court controlled and sanctioned process under Part 5.1 of the *Corporations Act 2001* (Cth).

2 FOXTEL, Media Release: 'FOXTEL announces proposal to acquire AUSTAR', 26 May 2011, http://www.asx.com.au/asxpdf/20110526/pdf/41yw0z2wbjyq3d.pdf.

3 Australian Competition and Consumer Commission, *Merger Guidelines*, November 2008, http://www.accc.gov.au/content/item.phtml?itemId=809866&nodeId=3a4cf8c822dc673b7de0a525ac267933&fn=222_Merger%20guidelines_FA_WEB.pdf.

4 Australian Competition and Consumer Commission, *Merger Review Process Guidelines,* July 2006, http://www.accc.gov.au/content/item.phtml?itemId=740765&nodeId=31d493c38b88d05e189fc14d8a826d6b&fn=Merger%20Review%20Process%20Guideline.pdf.
Australian Competition and Consumer Commission, *Merger Review Process Guidelines Addendum,* May 2011, http://www.accc.gov.au/content/item.phtml?itemId=740765&nodeId=05044df92fd86ce01b530f0e413b1ccc&fn=Merger%20Review%20Process%20Guidelines%20Addendum.pdf.

determine whether the transaction is likely to impact on competition and, if so, in what ways. If, following an informal merger review, the ACCC decides it does not oppose a transaction, the merger parties will consider themselves free (at least for competition law purposes) to complete the transaction.

FOXTEL/AUSTAR review process
The ACCC's review of this transaction commenced on 26 May 2011 and was not completed until 10 April 2012.[5] This was an unusually long review period as the ACCC had 'stopped the clock' on a number of occasions awaiting further information from the merger parties. The ACCC also received submissions from various industry participants, including subscription television providers, free-to-air (***FTA***) television operators, content owners and telecommunications companies.

to the extent that FOXTEL's (and its shareholders') ownership of exclusive sports rights may raise competition concerns, these concerns existed independently of the proposed acquisition

On 22 July 2011, the ACCC published a Statement of Issues, outlining its preliminary views on the proposed transaction,[6] namely, that the transaction would likely result in a substantial lessening of competition in:

- the national market for the supply of subscription television services;
- the national market for the acquisition of audio visual content; and
- a number of markets for the supply of telecommunications products.

National market for subscription television
The ACCC was concerned that because FOXTEL and AUSTAR are the only significant providers of subscription television services in Australia, the proposed merger would create a near monopoly subscription television provider across Australia.

Notwithstanding that there was little direct competition between FOXTEL and AUSTAR (principally only on the Gold Coast), the ACCC's preliminary view was that the level of competition between them was likely to increase in the absence of the transaction (and that, as a result, expected increases in competition would be lost).

In particular, the ACCC considered that:

- significant technological developments (eg, the use of Internet Protocol Television (***IPTV***) and delivery of content to internet enabled devices such as gaming consoles); and
- significant industry changes which are likely to occur in the foreseeable future, including the rollout of the National Broadband Network (***NBN***),

have the potential to facilitate expansion and/or new entry by FOXTEL and AUSTAR into new product and geographic markets, thereby increasing competition between them.

Additionally, the ACCC considered that:

- alternative subscription television providers and FTA television operators are unlikely to be sufficiently close competitors to constrain the merged firm after the acquisition; and
- high barriers to entry and difficulties faced by new entrants in obtaining access to substantial television content mean that the threat of new entry is unlikely to constrain the merged firm after that acquisition. Indeed, the acquisition would increase barriers to entry and create a merged firm many times larger than its nearest rival.

National market for acquisition of audio visual content
The ACCC's preliminary view was that there was likely to be a substantial lessening of competition in the market for the acquisition of audio visual content, as a flow-on effect from the lessening of competition in the national market for the supply of subscription television services (ie, fewer subscription television providers will directly lead to fewer buyers of content).

The ACCC was also of the view that the merged firm was likely to be able to effectively discriminate against suppliers of content, on the basis that there are substantial market segments for which there is limited or no competition from FTA television operators and other audio visual content acquirers.

Telecommunications markets
The ACCC's preliminary view was that the proposed acquisition was likely to substantially lessen competition in a number of telecommunications markets. The ACCC highlighted the increasing importance of telecommunications and broadband competitors being able to provide a bundle of three or four services to consumers (including fixed line telephone, mobile telephony, subscription television and broadband internet services), particularly after the rollout of the NBN.

The ACCC also thought that Telstra, through its 50% shareholding in FOXTEL, would be well placed to provide such bundled services. Other telecommunications providers and internet service providers (***ISPs***) reportedly raised concerns that because they lack corporate or commercial links to subscription television providers of substantial scale, they would be at a disadvantage relative to Telstra in being able to provide consumers with a bundle of services. The ACCC suggested that AUSTAR was an important future competitor in providing bundled services (either by itself or in partnership with telecommunications providers and ISPs), which would be lost if the acquisition was allowed to proceed.

Following the release of the Statement of Issues, the parties were given an opportunity to provide further submissions and conduct further negotiations to attempt to allay the ACCC's competition concerns. In fact, the ACCC delayed its proposed decision three times to allow the parties to explore whether a negotiated outcome could be reached.

Court-enforceable undertaking

On 9 April 2012, the ACCC accepted from FOXTEL a court-enforceable undertaking under section 87B of the Act.[7]

Statutory and regulatory regime
Under section 87B, the ACCC may accept a written undertaking from a party to allay any competition concerns identified in connection with a proposed acquisition. The ACCC considers that such undertakings 'play a critical role in administering and enforcing' section 50 and provide a 'flexible alternative to simply opposing an

5 The total number of review days was 106. The total number of review days equals the total number business days minus public holidays and time during which the review was suspended: Australian Competition and Consumer Commission, Merger Register: 'FOXTEL – proposed acquisition of AUSTAR United Communications Limited', http://www.accc.gov.au/content/index.phtml/itemId/1044881.

6 Australian Competition and Consumer Commission, *Statement of Issues: FOXTEL – proposed acquisition of AUSTAR United Communications Limited*, 22 July 2011, http://www.accc.gov.au/content/item.phtml?itemId=998733&nodeId=42186e6c27337ea6b5f4cfe884a51426&fn=FOXTEL%20proposed%20acquisition%20of%20AUSTAR%20United%20Communications%20Limited%20-%2022%20July%202011.pdf.

7 FOXTEL Management Pty Limited, 'Undertaking to the Australian Competition and Consumer Commission', 9 April 2012, http://www.accc.gov.au/content/item.phtml?itemId=1047780&nodeId=71053914f884cb6f54a2c66869f93102&fn=FOXTEL.pdf.

acquisition'.[8] In determining whether undertakings are acceptable, the ACCC considers a range of factors, including the effectiveness of the undertaking to address competition concerns, how difficult the undertaking will be to administer, the ability of the merged firm to deliver the required outcomes, and monitoring and compliance costs. In the event that an undertaking is breached, the ACCC can seek orders from a Court for its enforcement.

The type of undertaking FOXTEL gave was a behavioural undertaking. This type of undertaking prescribes that certain conduct be carried out, directed or avoided by the merged firm on an ongoing basis to minimise its ability to exercise anti-competitive market power. Interestingly, the ACCC accepted this behavioural undertaking in the absence of a structural undertaking.[9] This is unusual because the ACCC's policy is that behavioural undertakings are 'rarely appropriate on their own to address competition concerns'.[10]

Scope of undertaking offered by FOXTEL

To address the ACCC's competition concerns (which FOXTEL did not agree with) and avoid further delay to the transaction, FOXTEL offered undertakings.

The ACCC conducted extensive market inquiries in relation to a draft version of the undertaking offered by FOXTEL. Following market feedback and further discussions with FOXTEL, the nature and scope of content addressed by the non-exclusivity provisions in the undertaking was significantly broadened to obtain the ACCC's approval

The undertaking Foxtel gave prevents it from:

- acquiring exclusive IPTV rights for a range of attractive television program and movie content, including:
    - linear channels supplied by independent content suppliers, including over 60 current FOXTEL channels and other international channels (for example Disney, ESPN and MTV);
    - Subscription Video on Demand (***SVOD***) rights to television programs that form part of a linear channel supplied by an independent content supplier;
    - movie linear channels (or movies for inclusion in a linear channel) from more than 50% of the eight major movie studios or more than 50% of the eight specified independent movie studios; and
    - SVOD rights to movies, except for an 18 month window in relation to new release movies acquired from the movie studios from which FOXTEL is not prohibited from acquiring exclusive linear rights; and
- exclusively acquiring any movie for distribution on a Transactional Video on Demand (***TVOD***) basis; and
- entering into any agreement that prevents a third party from acquiring mobile rights to the above content to combine with IPTV rights (ie, allowing third parties to deliver a bundled package of programming across a number of devices).

The undertaking does not prevent FOXTEL from acquiring exclusive rights in relation to individual sports. The ACCC considered that to the extent that FOXTEL's (and its shareholders') ownership of exclusive sports rights may raise competition concerns, these concerns existed independently of the proposed acquisition. The ACCC stated that it will nevertheless 'continue to consider whether there is a need to advocate for regulatory intervention in these markets.'[11]

ACCC green light

After accepting the undertaking, the ACCC announced on 10 April 2012 that it would not oppose the acquisition.[12] The Scheme was subsequently approved by the Federal Court of Australia on 13 April 2012.

AUSTAR CEO John Porter stated that the merger 'will create an even greater Australian media company, one that will continue the AUSTAR tradition of innovation, entertainment and customer service excellence'.[13]

FOXTEL will likely take control of AUSTAR in late-May 2012.

The extent to which the ACCC actively monitors FOXTEL's compliance with its undertaking remains to be seen

Implications

A number of important lessons can be learned from the FOXTEL/AUSTAR experience with the ACCC:

- There is real potential for ACCC regulatory approval to scuttle (or at least significantly delay) a proposed transaction in the telecommunications/media sector given the increasing concentration of ownership of particular media. In this case, the transaction took more than ten months to clear the ACCC regulatory process and, even then, only with the making of significant concessions. Some transactions, quite simply, could not withstand such regulatory delay;
- The ACCC's willingness to accept behavioural undertakings to allay its competition concerns, is interesting. For many years, the ACCC has simply refused to accept undertakings which rely solely (or even predominantly) on, in effect, a 'promise' from a merger party to limit the activity in which it engages. The extent to which the ACCC actively monitors FOXTEL's compliance with its undertaking remains to be seen;
- Notwithstanding obvious convergence in recent years across media platforms and technology, the ACCC's primary position appears to be that, for the purposes of Australian competition law, separate markets exist across different modes of content delivery. For example, the ACCC is of the view that subscription television and FTA television are in different markets (ie, they are not closely competitive). This reflects the Federal Court of Australia's decision in the C7 case;[14] and
- The ACCC's view on markets has implications for the Australian Government's Convergence Review. There is a real question to be answered; whether section 50 of the Act is adequate to protect against concentration in cross-media ownership, in circumstances where the ACCC appears likely to conclude that traditional forms of media, such as television, radio and newspapers, and dynamic forms of new media, each remain in separate markets for competition law purposes.

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8 ACCC, *Merger Guidelines* ,above n 3, at 62.

9 A structural undertaking is an undertaking which provides for one-off actions that alter the entry conditions or the relationships in a particular industry (for example, divestment of part of a merged firm).

10 ACCC, *Merger Guidelines* ,above n 3),at 63.

11 Australian Competition and Consumer Commission, News Release: 'ACCC not to oppose AUSTAR acquisition after undertaking resolves concerns', 10 April 2012, http://www.accc.gov.au/content/index.phtml/itemId/1044888/fromItemId/142.

12 ACCC, News Release, 10 April 2012 (above n 11).

13 AUSTAR, Media Release, 'AUSTAR welcomes court approval for FOXTEL transaction', 13 April 2012, www.AUSTARunited.com.au/file/609.pdf.

14 *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 per Mansfield, Dowsett and Lander JJ; *Seven Network Ltd v News Ltd* [2007] FCA 1062 per Sackville J.

Not Quite the End of the Road(show)?[1] The High Court's Decision In iiNet

Wen H. Wu[2] reviews the High Court's decision in Roadshow Films v iiNet and considers its impact on the doctrine of authorisation and its continuing relevance for internet service providers and other internet intermediaries.

On 20 April 2012, the High Court of Australia handed down its decision in Roadshow Films Pty Ltd v iiNet Limited [2012] HCA 16 (***iiNet Case***). As has already been widely reported, the High Court unanimously held that iiNet Limited (***iiNet***), one of Australia's largest internet service providers, was not liable for "authorising" copyright infringement by allowing its users to engage in unauthorised file-sharing across the BitTorrent peer-to-peer network.

The ultimate question was whether the answers to these factual questions gave rise to an inference that iiNet authorised its users' infringements.[14]

Background

The facts and the law behind the iiNet Case are well known and, in the interest of brevity, will only be set out in summary form.[3]

In November 2008, thirty-four film companies commenced copyright infringement proceedings against iiNet, one of Australia's largest internet service providers. The film companies alleged that iiNet "authorised" copyright infringements by allowing its users to engage in unauthorised file-sharing of films across the BitTorrent peer-to-peer network, and was therefore liable for copyright infringement under subsection 101(1) of the *Copyright Act 1968* (Cth). The film companies had previously sent iiNet notices detailing infringements by its users, without full details of the detection methodology, and demanded that iiNet take steps to warn the infringing users, or suspend or terminate their internet service. iiNet refused to accede to the film companies' demands.

Subsection 101(1) of the *Copyright Act* provides:

> Subject to this Act, a copyright subsisting by virtue of [Part IV of the *Copyright Act*] is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

In determining whether a person has authorised another to do an act comprised in the copyright, subsection 101(1A) sets out three non-exhaustive factors that must be taken into account, which are:

(a) the extent (if any) of the person's power to prevent the doing of the act concerned;

(b) the nature of any relationship existing between the person and the person who did the act concerned;

(c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

The trial judge's decision[4] and the Full Court's decision[5] have previously been reviewed in this publication.[6] Prior to the High Court hearing, the trial judge's reasons for non-infringement had been substantially diluted by the Full Court.[7] In separate judgments and for distinct reasons, Emmett and Nicholas JJ, the majority, held that iiNet had not authorised its users' copyright infringements.[8]

The High Court's reasoning

The High Court's decision comprised the judgment of French CJ, Crennan and Kiefel JJ, and the judgment of Gummow and Hayne JJ. Both judgments provide detailed historical reviews of the doctrine of authorisation[9] and brief reasons for the Court's unanimous conclusion that iiNet did not authorise its users' copyright infringements.[10]

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1 Another law firm recently published a summary of the *iiNet* Case, entitled, "End of the road for Roadshow: iiNet did not authorise copyright infringement". In this article, the author seeks to show that the iiNet Case will continue to be of relevance for internet service providers and other internet intermediaries.

2 The author gives thanks to Associate Professors Michael Handler, Kim Weatherall and David Brennan, Ms Leanne O'Donnell and Dr Rebecca Giblin for their encouragement and support. All errors and omissions remain, of course, the author's own.

3 For more detailed background on the doctrine of authorisation and the iiNet Case, see: Sydney Birchall, :"A doctrine under pressure: The need for rationalisation of the doctrine of authorisation of infringement of copyright in Australia" (2004) 15 *AIPJ* 227; Michael Napthali, "Unauthorised: Some thoughts upon the doctrine of authorisation of copyright infringement in the peer-to-peer age" (2005) 16 *AIPJ* 5; Rebecca Giblin, "The uncertainties, baby: Hidden perils of Australia's authorisation law" (2009) 20 *AIPJ* 148; David Brennan, "ISP liability for copyright authorisation: The trial decision in *Roadshow Films v iiNet"* (2010) 28(4) *CLB* 1 (Part 1) and 29(1) *CLB* 8 (Part 2); Wen H. Wu, "A Pyrrhic victory for 'doing squat': A short critique of the Full Court's decision in *Roadshow Films v iiNet"* (2011) 29(4) *CLB* 9; Robert Burrell and Kimberlee Weatherall, "Before the High Court – Providing Services to Copyright Infringers: *Roadshow Films Pty Ltd v iiNet Ltd*'" (2011) 33 *Syd L R* 723; Rebecca Giblin, *Code Wars: 10 Years of P2P Software Litigation*, Edward Elgar Publishing (2011), 114-125.

4 *Roadshow Films v iiNet (No 3)* (2010) 263 ALR 215 (Cowdroy J).

5 *Roadshow Films v iiNet* (2011) 194 FCR 285 (Emmett, Jagot and Nicholas JJ).

6 David Brennan, n 3; Wen H. Wu, n 3.

7 Wen H. Wu, n 3, 10-12.

8 See *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285, 343 [257] (Emmett J), 459-461[776]-[783] (Nicholas J).

9 iiNet Case, [22], [42]-[53] (French CJ, Crennan and Kiefel JJ), [104]-[106], [121]-[134] (Gummow and Hayne JJ).

10 iiNet Case, [63]-[78] (French CJ, Crennan and Kiefel JJ), [135]-[147] (Gummow and Hayne JJ).

iiNet's only power was indirect; to terminate contractual relationships with infringing users[16]

Like the Full Court, the High Court affirmed the primacy of the factors in subsection 101(1A).[11] The Court's approach posited the statutory factors as a series of "interrelated" factual questions:[12]

(a) Did iiNet have a power to prevent the primary infringements and, if so, what was the extent of that power?

(b) What was the nature of the relationship between iiNet and its customers? How did that relationship bear upon the other two factors? How "immediate"[13] was the relationship between iiNet's conduct and the primary infringements?

(c) Did iiNet take any other reasonable steps to prevent or avoid the commission of the primary infringements? Did reasonable steps include the warning of customers, or suspension or termination of customer accounts?

The ultimate question was whether the answers to these factual questions gave rise to an inference that iiNet authorised its users' infringements.[14]

By having regard to the following considerations, the High Court held that iiNet did not authorise its users' infringements:

(a) iiNet did not have direct technical power to control or alter any aspect of the BitTorrent peer-to-peer system or take down the infringing material which had been made available online by its users;[15]

(b) iiNet's only power was indirect; to terminate contractual relationships with infringing users;[16]

(c) it was not reasonable to warn customers, or suspend or terminate their internet service based on the film companies' notices, given the detection methods used had not been disclosed to iiNet at the time when the notices were sent;[17]

(d) even if iiNet threatened to terminate or terminated a user's account, in the absence of a binding industry protocol, iiNet could not prevent users from switching to another internet service provider and continuing to infringe.[18]

Their Honours concluded:

> … the evidence showed that [iiNet's] inactivity was not the indifference of a company unconcerned with infringements of the [film companies'] rights. Rather, the true inference to be drawn is that iiNet was unwilling to act because of its assessment of the risks of taking steps based only on the information in the [film companies'] notices.[19]
>
> … The rhetorical question with reference to what had been said by Bankes LJ, which Whitford J posed in *CBS Inc v Ames Records & Tapes Ltd*,[20] may be asked here:
>
> > 'Is this again a case of the indifference of somebody who did not consider it his business to interfere, who had no desire to see another person's copyright infringed, but whose view was that copyright and infringement were matters in this case not for him, but for the owners of the copyright? It must be recalled that the most important matter to bear in mind is the circumstances established in evidence in each case.'[21]

Both judgments also called for legislative change to respond to online copyright infringement

As to section 112E of the *Copyright Act*, which provides that a person who provides facilities for the making of a communication is not taken to have authorised any copyright infringement "merely because" another person uses the facilities to infringe, the High Court agreed with the trial judge and Nicholas J of the Full Court that section 112E is rendered otiose by previous case law on authorisation.[22]

Both judgments also called for legislative change to respond to online copyright infringement, with Gummow and Hayne JJ writing:

> The history of the [*Copyright Act*] since 1968 shows that the Parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those press ures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions.[23]

Where does the iiNet Case leave the Australian doctrine of authorisation?

Before the High Court's decision in the iiNet Case, the meaning of "to authorise" in Australian jurisprudence was "to sanction, approve or countenance".[24] It was also accepted that these synonyms were to be read disjunctively.[25] This approach and its application by the High Court in *UNSW v Moorhouse*[26] have been criticised in the UK and Canada, which have their own respective doctrines of authorisation.[27]

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11 iiNet Case, [68] (French CJ, Crennan and Kiefel JJ), [135] (Gummow and Hayne JJ).

12 Ibid.

13 iiNet Case, [127] (Gummow and Hayne JJ).

14 iiNet Case, [63] (French CJ, Crennan and Kiefel JJ).

15 iiNet Case, [65] (French CJ, Crennan and Kiefel JJ), [137] (Gummow and Hayne JJ).

16 iiNet Case, [70] (French CJ, Crennan and Kiefel JJ), [139] (Gummow and Hayne JJ).

17 iiNet Case, [74]-[76], [78] (French CJ, Crennan and Kiefel JJ), [138] (Gummow and Hayne JJ).

18 iiNet Case, [73] (French CJ, Crennan and Kiefel JJ), [139] (Gummow and Hayne JJ).

19 iiNet Case, [76] (French CJ, Crennan and Kiefel JJ).

20 [1982] Ch 91, 112.

21 iiNet Case, [144] (Gummow and Hayne JJ).

22 iiNet Case, [26] (French CJ, Crennan and Kiefel JJ), citing *Roadshow Films v iiNet (No 3)* (2010) 263 ALR 215, 339 [574], and *iiNet Case*, [113] (Gummow and Hayne JJ), citing *Roadshow Films v iiNet* (2011) 194 FCR 285, 461 (Nicholas J).

23 iiNet Case, [120] (Gummow and Hayne JJ). See also iiNet Case, [79] (French CJ, Crennan and Kiefel JJ).

24 See, for example, *UNSW v Moorhouse* (1975) 133 CLR 1, 12 (Gibbs J), 20-21 (Jacobs J, with whom McTiernan J agreed); *Roadshow Films v iiNet* (2011) 194 FCR 285, 294 [24] (Emmett J), 394 [463] (Jagot J), 459 [776] (Nicholas J).

25 *Roadshow Films v iiNet* (2011) 194 FCR 285, 443 [701] (Nicholas J) and the cases cited therein.

26 (1975) 133 CLR1.

27 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 1 AC 1013, 1054 (Lord Templeman, with whom the other members of the House of Lords agreed); *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, 362 [40]-[41] (McLachlin CJ, delivering the judgment of the Supreme Court of Canada).

The High Court's decision in the iiNet Case moves away from the "sanction, approve or countenance" formulation. This is evidenced by the Court's criticism of the film companies' submission that iiNet "countenanced" its users' infringements, and also by the Court's adoption of other interpretations of "to authorise".

On "countenance", French CJ, Crennan and Kiefel JJ wrote:

> "Countenance" is a long-established English word which, unsurprisingly, has numerous forms and a number of meanings which encompass expressing support, including moral support or encouragement. In both the United Kingdom and Canada, it has been observed that some of the meanings of "countenance" are not co-extensive with "authorise". Such meanings are remote from the reality of authorisation which the statute contemplates. The argument highlights the danger in placing reliance on one of the synonyms for "authorise" to be found in a dictionary.[28]

The High Court's decision in the iiNet Case moves away from the "sanction, approve or countenance" formulation.

In the above passage, their Honours cited Lawton LJ in the Court of Appeal's decision in *Amstrad v the British Phonographic Industry*, who wrote:

> The words "sanction" and "approve" may almost have the same meaning as "authorise" but I doubt whether the word "countenance" always has. Insofar as the word "countenance" includes "condone," it is not, in my opinion, an accurate use of language to say that anyone who condones an unlawful act authorises it. Lord Reid's admonition in [*Brutus v Cozens*][29] about the danger of using synonyms when construing statutory words is particularly relevant to this appeal.[30]

Similarly, Gummow and Hayne JJ criticised the film companies' submission on "countenance":

> [I]t would be wrong to take from [the "sanction, approve or countenance" formulation] one element, such as "countenance", and by fixing upon the broadest dictionary meaning of that word to seek to expand the core notion of "authorise"…[31]
>
> The progression urged by the [film companies] from the evidence, to "indifference", to "countenancing", and so to "authorisation", is too long a march.[32]

It appears from the above passages that their Honours do not approve of reading the "sanction, approve or countenance" formulation disjunctively, contrary to the approach taken in previous authorities.[33]

Further, it appears that the High Court has endorsed Atkin LJ's interpretation of "to authorise" as "to grant or purport to grant",[34] as shown by the below passages:

> … Moreover, iiNet's customers could not possibly infer from iiNet's inactivity … that iiNet was in a position to grant those customers rights to make the appellants' films available online…[35]
>
> The phrase "to grant or purport to grant" used by Atkin LJ has a significance not always appreciated in those later cases, including [*UNSW v Moorhouse*], which repeat the phrase "sanction, approve, countenance". What is important for the present case is the immediacy in [*Falcon v Famous Players Film Co*] of the relationship between the primary infringement and the secondary infringement.[36]

Gummow and Hayne JJ relied on another interpretation of "to authorise" deriving from UK case law; that "to authorise" means the putative authoriser's conduct was "bound to" give rise to primary infringement.[37]

The Court's criticism of "countenance" and its adoption of other interpretations of authorisation have the effect of moving the Australian doctrine closer to its UK and Canadian counterparts.[38] It will also have the effect of curbing the expansion of the doctrine and steering it away from the approach that authorisation is a pseudo "duty of care" to prevent copyright infringement.[39]

Continuing relevance of authorisation for internet service providers and other internet intermediaries

Given that iiNet was ultimately vindicated by Australia's highest court, and the only way forward appears to be legislative change,[40] there remains a question as to whether the doctrine of authorisation remains relevant for internet service providers and other internet intermediaries. In the author's view, authorisation, as interpreted in the iiNet Case, as well as its common law cousin, joint tortfeasance, will continue to be relevant to internet service providers and other internet intermediaries as they continue to bring to market new "value added" services which go beyond the mere provision of telecommunication facilities. Two recent examples clearly illustrate this point.

The first is the Optus TV Now case,[41] which remains before the Australian courts.[42] In that case, a Full Court of the Federal Court held that Optus, the provider of a cloud-based TV recording service, made copies of copyright broadcasts on its servers and was not protected by the "time-shifting" exception in section 111 of the *Copyright Act*. The Full Court, in obiter, preferred the view that Optus' liability arose because it was a joint tortfeasor, that Optus

28 iiNet Case, [68] (French CJ, Crennan and Kiefel JJ).

29 [1973] AC 854, 861.

30 *Amstrad Consumer Electronics plc v The British Phonographic Industry Limited* [1986] FSR 159, 207, approved in *CBS v Amstrad*, n 27, 1055.

31 iiNet Case, [125] (Gummow and Hayne JJ). See also *CCH v Law Society*, n 27, 461 [38].

32 iiNet Case, [143] (Gummow and Hayne JJ).

33 See n 25 above and accompanying text.

34 *Falcon v Famous Players Film Co* [1926] 2 KB 474, 499.

35 iiNet Case, [76] (French CJ, Crennan and Kiefel JJ).

36 iiNet Case, [127] (Gummow and Hayne JJ).

37 iiNet Case, [121], [146] (Gummow and Hayne JJ).

38 *CBS v Amstrad*, n 27, 1054; *CCH v Law Society*, n 27, 361-364 [38]-[46]. See also Warwick Rothnie, "Roadshow: second look", 2 May 2012, at URL http://ipwars.com/2012/05/02/roadshow-second-look/ (last accessed 15 May 2012).

39 iiNet Case, [115] (Gummow and Hayne JJ), citing *CBS v Amstrad*, n 27, 1059-1060.

40 See n 23 above and accompanying text.

41 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (Finn, Emmett and Bennett JJ), allowing an appeal from *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 285 ALR 157 (Rares J).

42 Optus has since indicated that it would seek special leave to appeal to the High Court from the Full Court's decision.

… Moreover, iiNet's customers could not possibly infer from iiNet's inactivity … that iiNet was in a position to grant those customers rights to make the appellants' films available online…[35]

had engaged in a "common design" with its customers to make copies which, in Optus' case, were not protected from liability by the "time-shifting" exception.[43]

The second example is the introduction and subsequent withdrawal from market of a "global mode" internet service provided by a New Zealand internet service provider, Fyx, which had been promoted as a "legal" solution to circumvent the common use of "geo-blocking" on overseas video streaming websites.[44] If such a service were to be offered in Australia, it would be difficult to argue that the internet service provider was not authorising its customers' conduct, in the sense of "sanctioning, approving or countenancing" that conduct or, after the iiNet Case, "granting or purporting to grant" the right to watch those streams.[45] It appears that, under Australian law, watching overseas video streams by circumventing "geo-blocking" would be a primary infringement of copyright in that content.[46]

Despite iiNet's victory, the risk of secondary liability for copyright infringement, including authorisation liability, will remain front of mind for internet service providers and other internet intermediaries.

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43 *NRL v Optus* [2012] FCAFC 59, [76]-[78], [89], [92].

44 *iTnews*, "Kiwi ISP claims legal clarity on geoblock-busting service", 11 May 2012, at URL: http://www.itnews.com.au/News/300334,kiwi-isp-claims-legal-clarity-on-geoblock-busting-service.aspx and "Kiwi ISP withdraws internet geoblock Fyx", 11 May 2012, at URL: http://www.itnews.com.au/News/300423,kiwi-isp-withdraws-internet-geoblock-fyx.aspx (last accessed 15 May 2012).

45 See also Karl Schaffarczyk and Bruce Arnold, "FYX ISP will unlock 'geoblocked' sites but will it breach copyright?", 11 May 2012, *The Conversation*, at URL: http://theconversation.edu.au/fyx-isp-will-unlock-geoblocked-sites-but-will-it-breach-copyright-6927 (last accessed 15 May 2012).

46 One of the exclusive rights comprised in the copyright in cinematograph films is to communicate the film to the public: s 86(c), *Copyright Act*. A communication other than a broadcast is taken to have been made by the person responsible for determining its content (s 22(6)), which in this case is arguably the user circumventing the "geo-blocking". The user is part of the copyright owner's "public": *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140, 157 (Dawson and Gaudron JJ). There does not appear to be an applicable parallel importing exception in the *Copyright Act* for such conduct.

Excerpt From 'Networking: Commercial Television in Australia' by Nick Herd, Published by Currency House

Nick Herd has produced a history of commercial television that traces the political and economic development of this important cultural institution from its genesis to the present day. Set out below is an extract from this recently published work. The full work can be purchased from Currency House at http://www.currencyhouse.org.au/node/222

The time is 1957. Television had commenced the previous year and now both the government and media players were considering how it could be extended beyond Sydney and Melbourne. By mid 1957 the Australian Broadcasting Control Board was advising the Postmaster General Charles Davidson (Deputy Leader of the Country party)that television was ready to go to other capital cities:

> While this was occurring, the firms already in the market were attempting to form a coalition that would allow them to extend their control when the time was ripe. On 23 April 1957, a meeting took place at the offices of the *Sydney Morning Herald*.[1] Precisely who called this meeting is not certain, but Rupert Henderson, general manager of John Fairfax and chair of ATN, was probably the host. Present were Frank Packer (chair TCN), Sir John Williams (CEO Herald and Weekly Times), D.S. Sherman (general manager, Queensland Press), Sir Arthur Warner (Electronic Industries, chair GTV) Clive Ogilvy (chair Macquarie Broadcasting) and Sir Lionel Hooke (managing director, AWA). These people represented the existing Sydney and Melbourne licensees or, like Ogilvy and Hooke, were shareholders in ATN. Not invited to this meeting was Rupert Murdoch, whose company News Ltd controlled one of the Adelaide newspapers that might be in the bidding for a television licence.
>
> The purpose of the meeting was to discuss how the various parties represented might establish commercial television in Brisbane. There were then two groups interested, one associated with motion picture and other interests and one with the AWA and HWT subsidiaries. For these men it was of only minor concern that the Government had yet to announce a starting date for Brisbane. Their own stations were still sustaining losses and it was by no means clear when they might turn a profit. Probably for this reason the meeting recognised that the cost of starting two services in Brisbane 'would exceed the revenue capacity of the market for some time'. But they also knew they were *obviously beginning on a network operation which would extend throughout Australia as other stations were opened up in cities other than Sydney and Melbourne.*[2]

1 We know of this meeting because its minutes and the subsequent correspondence between members of the group were made available to the ABCB in its public inquiry into the grant of the licence in Brisbane.

2 Australian Broadcasting Control Board, 1958, *Report and recommendations to the PMG pursuant to the Television Act 1953 and the Television regulations for Commercial Television licences for the Brisbane and Adelaide areas, Canberra: Government printer's Office*, p.36

The meeting highlights the extent to which these competitors were prepared to collude to advance their common interest. Packer and Henderson were fierce rivals in the Sydney newspaper market, which had now extended to television. Williams, who had taken over from Keith Murdoch, was running a company with national interests and ambitions for further expansion. Even more significantly, the meeting demonstrates that these powerbrokers, in direct contravention of the Government's intention, had already cemented a joint understanding that their best interests lay in a network operation radiating from Sydney and Melbourne.

the licences should go to those with the strongest ties to the community they were to serve, that networks of ownership were to be discouraged and that the number of licences awarded would be based on the Board's assessment of the financial viability of the market to support the gradual introduction of television

The general expectation at the meeting was that two licences might be offered in Adelaide, but only one licence each to Perth and Hobart. The group canvassed the possibility of forming a joint bid for Adelaide in the event that only a single licence was offered; and agreed that if it turned out there were to be two licences, then each network grouping would have an outlet for their programming. They might also save costs by erecting joint studio and transmission facilities. The joint plan came to nothing. Attempts to agree on how to cooperate failed. ATN and GTV bought into Queensland Television Ltd, a company formed to apply for a licence. The HWT, through its subsidiaries Queensland Newspapers Ltd (*Courier-Mail*) and Advertiser Newspapers Ltd, also formed companies to apply for the licences in Brisbane and Adelaide respectively. Frank Packer had no connections outside Sydney, so he formed a subsidiary company as the vehicle for his tilt at the licences—Australian Consolidated Press, which came to hold both his print and television interests.

On 4 September 1957 Minister Davidson announced that hearings would take place in early 1958 for the award of licences in Brisbane, Adelaide, Hobart and Perth. The question of the number of licences to be awarded was left open. On 17 October Davidson stated:

The Government has made no decision as to the number of licences to be granted in each of the centres concerned, and will not do so until the Board has made its recommendations following the public enquiries.[3]

When applications closed for Adelaide and Brisbane the groups applying were: Adelaide: Australian Consolidated Press, Southern Television (News Ltd), A.G. Healing (a television appliance retailer whose application was subsequently withdrawn) and Television Broadcasters (Advertiser newspapers-HWT); Brisbane: Australian Consolidated Press, Queensland Television (ATN, GTV and Ezra Norton's *Truth* group) and Brisbane TV (Queensland Newspapers-HWT).

In Sydney and Melbourne the ABCB had constructed for themselves a set of criteria for the award of the licences that strongly favoured the existing newspaper, radio and appliance manufacturers. This was not abandoned, but when it came to Brisbane and Adelaide the ABCB followed what it thought was the Government's policy of localism. That is, the licences should go to those with the strongest ties to the community they were to serve, that networks of ownership were to be discouraged and that the number of licences awarded would be based on the Board's assessment of the financial viability of the market to support the gradual introduction of television. This at once set it on a collision course with the media companies, who had already decided that the process was about how they might extend their influence into the new markets.

The ABCB applied the tests of localism and financial viability to the applications received and reported to the Government on 25 July 1958. It concluded that while co-operation between licensees was desirable to help defray the cost of Australian programming, such co-operation did not require one station to exercise control over another's programs. In particular it found that the agreement between GTV, ATN and Queensland Television Ltd contravened this by giving the Sydney and Melbourne stations control over prime time programming in Brisbane.

The ABCB report stated:

The grant of a commercial television licence is a privilege of great public importance, especially to the people in the area in which the station is established; and there seems little doubt for its most effective use a commercial television station should, as far as possible, be in the hands or under the control of those people operating through the medium of a representative and independent company.[4]

This, they said, was a view that clearly arose from the legislation itself. The ABCB also noted that:

Many of the submissions and much of the evidence were directed to the interests of the existing stations and to their development; and these considerations so dominated the inquiry as to give rise to basic issues in relation to the future of commercial television services in this country.[5]

This is perhaps not a surprising outcome given the nature of the applicants. It caused the Board to draw their members' concern to the attention of the Government. They wrote, accusingly:

The issue again is whether the expansion of the interests of groups already powerful in the fields of mass communications is to be accepted, or whether, in the public interest, the local ownership of stations and the independence of licensees is the objective to be achieved.[6]

On the issue of the number of stations, the ABCB pointed out that the decision to offer two licences in Sydney and Melbourne did not 'set the pattern for extension of television services to other capital cities'. There were special reasons for

3 Ibid p.23

4 Ibid p. 26

5 Ibid p. 28

6 Ibid p. 28

that decision. And, given the size of the markets in Brisbane and Adelaide (where retail sales were roughly a third of those in Melbourne and Sydney) no more than one station would be viable. This was supported to some extent by the applicants—both Frank Packer and Sir Arthur Warner gave evidence that having two stations would mean each would take five years to reach a profit. The ABCB also insisted:

> *We are not convinced from the experience of Sydney and Melbourne that competition necessarily ensures better programs. We consider that one commercial station with good prospects from the outset is likely to provide a wider coverage of public events than two stations which are making a loss.*[7]

It concluded:

> The grant of two licences in Brisbane and Adelaide at the present time would be inconsistent with the expressed policy of the Government in relation to the gradual development of the television services and the local ownership and control of stations.[8]

> *The ABCB recommended that only one licence be awarded, found that none of the applicants was suitable and asked the Government to call for fresh applications.*

The ABCB's recommendation went to Cabinet in September 1958. In his autobiography James Darling, deputy chair of the ABCB, claims that Cabinet was divided on the recommendation. PMG Davidson supported it, but William McMahon, Minister for Primary Industry, opposed. According to Darling, Menzies broke the deadlock by saying, 'Oh well, better let them have it.' On 11 September Davidson announced to Parliament the ABCB's recommendation of a new round had not been accepted and that he had asked the ABCB to submit a supplementary report selecting two applicants from the existing groups.

Of the members, Darling at least gave consideration to resigning over this issue but appears not to have done so at the urging of Menzies, who held before him the prospect of other appointments.[9] He was subsequently appointed chair of the ABC. Barry Cole comments:

> *It is clear that by not resigning and by not making any suggestions of resigning, the Board not only ensured the continuation of its subservient position in respect to the Government and Parliament, it also lost a great deal of respect in the eyes of the industry.*[10]

On the other hand, media scholar Mark Armstrong is not sure what resignation would have achieved in terms of change to the institution of the ABCB.[11] Certainly it did make very clear that in politically sensitive areas such as licensing, the role of the ABCB was to be purely advisory and could be overruled by the Government.

The full work **'Networking: Commercial television in Australia'** *can be purchased from Currency House at http://www.currencyhouse.org.au/node/222*

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On the issue of the number of stations, the ABCB pointed out that the decision to offer two licences in Sydney and Melbourne did not 'set the pattern for extension of television services to other capital cities'.

7 Ibid p.25

8 Ibid p.30

9 Darling J, 1978, *Richly Rewarding*, Melbourne: Hill of Content, p.218

10 Cole, B., 1970, 'The Australian Broadcasting Control Board, 1948-1966: The history of board appointments', *Public Administration*, 29.3, 268-83, p.83

11 Armstrong M,1980, 'The Broadcasting and Television Act, 1948-1976: A case study of the Australian Broadcasting Control Board', in *Legislation and Society in Australia*, ed. by R. Tomasic (Sydney: NSW Law Foundation & Allen and Unwin), p. 142

Continued from Page 9

Arguably the specific consent requirement does not add any privacy protection with respect to Facebook's Photo Tag Suggest because a user's Facebook friends can already view her political views on her profile. However, the reason this requirement may be needed is because there are at least two types of Facebook users: (1) those who use it as a virtual school yard or a lunch break room—simply to share everyday thoughts with their friends; and (2) users who state their political views (or other sensitive information), suggesting that they may use Facebook for a political cause.[78]

The more difficult question is whether biometric data from friends' photos can be considered "generally accessible."

The BDSG thus requires Facebook to provide the second group with additional notice and obtain consent specifically referring to the sensitive information at issue. Why does the second group need that additional notice? To see this, we can take the hypothetical example of a Facebook user who is a dissident in an oppressive regime. She states her political views on her profile and uses Facebook to plan future protests. Provided that she has not accidentally "friended" a government official who has created a fictitious account or tapped into another user's account, the government should not be able to use Facebook's Photo Tag Suggest to identify this dissident in photos. But if her friends were to upload photos of protests and use Photo Tag Suggest to identify her, a government official may be able to access those photos and see her name where she otherwise would have remained an anonymous face. The official may further be able to follow the hyperlink to her profile. Even if she already restricted her privacy settings to prevent the official from accessing the sensitive information in her profile, a tagged photo could give the official a clue as to where to find more information about the dissidents. The official may then try to hack into Facebook to obtain her personal information and contacts.[79] Additionally, the tagged photo may suggest to the official that the user participates in a group that organizes online, whereupon the government may try to disable her Internet access. Though Facebook would not be legally responsible for such actions taken by the oppressive government, the idea behind BDSG's requirements is to motivate Facebook to provide users with special notice when sensitive information is involved, so that users can take precautions as they see fit.

Privacy protection is particularly important as social networks are becoming channels for democratic discourse.[80] It could be argued that the problem demonstrated in the hypothetical above lies in the fact that Facebook is a general-purpose application that is not designed for political discourse and the BDGS's requirements are simply trying to fit a round peg into a square hole. If so, the solution would be to educate users not to use social networks for political purposes. But the very fact that Facebook is a general-purpose application may explain its potency for political action.[81] Facebook's executives have also emphasized its "key role in pushing demonstrators out of the closet and into Tahrir Square" during the Arab Spring in 2011.[82] Facebook's willingness to embrace this new role is admirable. However, some adjustments to its platform are necessary to ensure the safety of the people that rely on it for this purpose.

4. Overall Effectiveness of the German Law

The detailed requirements of user participation and informed consent—as well as specific consent requirements for sensitive information—allows Facebook users to regain some control over the immense amount of personal information that has migrated to the site. The BDSG achieves this without undue constraint on commercial interests and innovation. Facebook is, for example, not prohibited from introducing the Photo Tag Suggest. It simply must do it gradually and with full knowledge and permission from the users supplying their information.

This analysis of the BDSG with respect to Facebook's Photo Tag Suggest can also be extrapolated to online privacy more generally. The BDSG's provisions are effective because they are relatively specific as to what is required. They counter the typical pattern of online businesses to narrowly interpret ambiguous privacy laws in order to gain a competitive edge. That said, there remains room for improvement. The legislation could, for example, particularize the format of the required consent and the type of information that needs to be provided to the users. It could also be broken down by type of service and data, to eliminate any ambiguities.

C. Why Is the Hamburg Data Protection Agency Threatening Action Under German Law?

The press coverage of the German action against Facebook has been imbued with confusion about whether German law applies to Facebook and why the Hamburg Data Protection Agency—a German state, as opposed to federal, agency—is pursuing this action. To clear up that confusion, this article reviews the applicable choice of law and jurisdiction provisions.[83]

1. Does German Law Apply to Facebook?

The EU Data Protection Directive dictates that the transposing national legislation—such as the BDSG—should govern "the activities of [a company] on the territory of the Member State."[84] It further provides that if a company is "established on the territory of several Member States, [it] must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable."[85] While Facebook has many offices in different EU countries, it also has an office in Hamburg, Germany.[86] The Directive therefore requires its operations in Germany to comply with German law.

There is a common misconception in the media that Facebook is only required to comply with Irish law that implements the Direc-

78 While the focus of this paper is on Facebook's face recognition feature, it should be noted that the BDSG would likely require Facebook to obtain specific consent from this second group of users with respect to many other functions that implicate sensitive information on their profiles.

79 For example, government security organizations or other organizations connected to the Syrian, Tunisian, Yemeni, and Iranian governments were believed to hack dissident websites and Facebook pages during the Arab Spring in 2011. Helmi Noman, *The Emergence of Open and Organized Pro-Government Cyber Attacks in the Middle East: The Case of the Syrian Electronic Army,* Infowar Monitor, May 30, 2011, http://www.infowar-monitor.net/2011/05/7349/ (last visited Nov. 28, 2011).

80 Recommendation CM/Rec (2012) 4 of the Committee of Ministers to Member States on the Protection of Human Rights with Regard to Social Networking Services, Council of Europe, Apr. 4, 2012, https://wcd.coe.int/ViewDoc.jsp?id=1929453&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (last visited Apr. 19, 2012).

81 See, e.g., Noam Cohen, *As Blogs Are Censored, It's Kittens to the Rescue,* New York Times, Jun. 21, 2009 (discussing Ethan Zuckerman's "Cute Cat Theory"), http://www.nytimes.com/2009/06/22/technology/internet/22link.html (last visited Dec. 1, 2011).

82 Brent Lang, *Facebook's Sheryl Sandberg: The Social Network Is a Force for Good,* The Wrap, Sept. 16, 2011, http://www.thewrap.com/media/column-post/facebooks-sheryl-sandberg-finding-jobs-spurring-arab-spring-31054 (last visited Nov. 29, 2011).

83 See Jonathan L. Zittrain, Jurisdiction 4 (Foundation Press 2005) (discussing the scope of choice of law and jurisdiction in cyberlaw).

84 European Parliament and Council Directive 95/45, supra note 54, Art. 4(1)(a).

85 Id.

tive.[87] The source of confusion appears to be that Facebook's international headquarters are located in Dublin, Ireland and that its terms of use provide a contractual relationship between Facebook's European users and Facebook Ireland Limited.[88] The notion that an Internet company must follow the law of the EU country where its headquarters are located comes from the EU Electronic Commerce Directive ("E-Commerce Directive").[89] Were the E-Commerce Directive applicable, the choice of law would depend on which Facebook office provides the relevant services to the German users.[90] Because Facebook's terms identify Facebook Ireland Limited as the contractual service provider for its European users, it is not clear that the Hamburg office would be found to be the provider of Facebook's services in Germany. This ambiguity may require an analysis of where Facebook has its "center of activities," which for the European market may well be in Ireland where the headquarters are located.[91] However, the jurisdiction analysis under the E-Commerce Directive is not applicable here. Rather, the E-Commerce Directive dictates that the choice of law for "the processing of personal data is solely governed by [the EU Data Protection] Directive," which as discussed above requires companies that are established in several EU countries to comply with all their data protection laws.[92] Thus, Facebook's Irish headquarters do not affect the applicability of BDSG to Facebook's processing of personal information in Germany.[93]

2. The Jurisdiction of the Hamburg Data Protection Agency

The Hamburg Data Protection Agency is further the appropriate agency to enforce the BDSG against Facebook's German operation because Facebook is a private entity with operations in Hamburg. While the BDSG tasks the Federal Data Protection Agency with monitoring the data practices of public entities, it requires local governments for the various Länder (i.e. states) to establish data protection agencies to oversee the *private* sector.[94] Accordingly, section 24 of the Hamburg Data Protection Act provides that that the Hamburg Data Protection Agency has the authority to monitor private entities' compliance with the BDSG in Hamburg.[95] In the course of its monitoring, this agency may require entities to provide information within a specified period of time and may inspect their facilities and business records during normal office hours.[96] The agency may also order a company to cure violations of the BDSG and impose fines.[97] If the company fails to comply with an order within a reasonable time and the violation involves a serious breach of privacy, the agency may enjoin the processing of data until the violation is remedied.[98] Given that Facebook is a private entity with an office in Hamburg, the Hamburg Data Protection Agency has jurisdiction to inspect its operation and may file an action if it finds a violation.

when used in social networks, face recognition technology is also capable of connecting an otherwise anonymous face to a vast amount of personal information

III. Conclusion

Social networks provide people with an incredibly valuable tool for social interaction. In a fast-paced globalized world, they allow users to stay in touch with their friends and family in a meaningful way regardless of their geographical location. Yet Facebook and other social networks have a commercial interest in aggregating users personal information to sell advertising.[99] Face recognition technology, in particular, serves this function by simplifying the process of uploading and tagging many photos.[100] However, when used in social networks, face recognition technology is also capable of connecting an otherwise anonymous face to a vast amount of personal information. Given that this process implicates an individual's right to information self-determination, it is thoroughly regulated by the German Federal Data Protection Act. This law is enforceable by the Hamburg Data Protection Agency that has jurisdiction over all private entities in Hamburg and it applies to Facebook's data uses in Germany even though Facebook's headquarters are located in Dublin. As the Hamburg Data Protection Agency is still to file its threatened action against Facebook, we may soon discover the true force of this law as applied to face recognition technology.

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1 A much earlier version of this article was submitted in conjunction with a seminar and the author would like to thank Prof. Herbert Burkert for his thoughtful comments on that draft. The author would also like to thank Prof. Daria Roithmayr, Prof. Jonathan Zittrain, Prof. Yochai Benkler, Angelica Eriksson, and Ryan Budish for their invaluable comments on earlier versions of this article. Any errors and omissions are the author's own.

86 Factsheet, Facebook, https://www.facebook.com/press/info.php?factsheet (last visited Nov. 11, 2011).

87 See, e.g., Pamela Duncan, *Commissioner to Begin Facebook Audit,* IRISH TIMES, Sept. 28, 2011, http://www.irishtimes.com/newspaper/breaking/2011/0928/breaking60.html (last visited Nov. 11, 2011); Tiffany Kaiser, FTC, *Irish Data Protection Commissioner Probe Facebook Over Privacy Concerns,* DAILYTECH, Sept. 30, 2011, http://www.dailytech.com/article.aspx?newsid=22889 (last visited Nov. 15, 2011); *Data Commissioner to begin Facebook audit,* RTE NEWS, Sept. 28, 2011, http://www.rte.ie/news/2011/0928/facebook.html (last visited Nov. 15, 2011).

88 Press Release: Facebook, Facebook to Establish International Headquarters in Dublin, Ireland (Oct. 2, 2008), available at https://www.facebook.com/press/releases.php?p=59042 (last visited Nov. 11, 2011); *Terms of Use,* Facebook, Section 18, https://www.facebook.com/terms.php (last visited Nov.11, 2011).

89 Council Directive E-Commerce Directive 2000/31, 2000 O.J. (178) 1 (EC), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF (last visited Nov. 11, 2011).

90 The E-Commerce Directive provides that "[e]ach Member State shall ensure that the information society services provided by a service provider established on its territory comply with . . . national provisions." *Id.* Art. 3. "[T]he concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period." *Id.* at Recital 18. When "a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided." *Id.*

91 If "it is difficult to determine from which of several places of establishment a given service is provided, ... the place where the provider has the cent[er] of his activities relating to this particular service" is deemed to be the "place of establishment." *Id.*

92 European Parliament and Council Directive 95/46, *supra* note 54, Recital 14.

93 To be sure, Facebook's data processing in Ireland does fall under Irish jurisdiction and the Irish Data Protection Agency is also investigating the legality of the Photo Tag Suggest. Carl Franzen, *Facebook Making Changes to Avoid Irish Fines,* TPM (Nov. 14, 2011, 3:20 PM), *http://idealab.talkingpointsmemo.com/2011/11/facebooks-irish-privacy-audit-results-due-before-2012.php* (last visited Nov. 15, 2011).

94 BDSG, Section 38(6).

95 Hamburgisches Datenschutzgesetz [HmbDS , Hamburg Data Protection Act], Jul. 5, 1990, GVBI. Hamburg, § 24, available at http://www.datenschutz-hamburg.de/uploads/media/Hamburgisches_Datenschutzgesetz__HmbDSG_.pdf (last visited Dec. 1, 2011).

96 BDSG, §§ 38(3) and (4).

97 *Id.* § 38(5).

98 *Id.*

99 Ballmer: They Paid How Much For That?, Bloomberg BusinessWeek, Oct. 23, 2006, http://www.businessweek.com/magazine/content/06_43/b4006066.htm (last visited Nov. 15, 2011).

100 Mitchell, *supra* note 22.

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