

## Update Your Privacy Settings: Privacy Law Reform 2014

In a speech to CAMLA members and guests, the Australian Privacy Commissioner provides an overview of key privacy reforms and an insight into the regulator's challenges and approach in a new era of privacy regulation in Australia.

### Privacy in the headlines

I last spoke to you about 18 months ago, in September 2011. Much has changed in the privacy environment since that time — 18 months ago the News of the World scandal was in the headlines and there was much discussion about a statutory right to privacy.

Not surprisingly privacy has rarely been out of the news since that time. In the UK, we have seen the release of Lord Justice Leveson's report on the culture and ethics of media in which privacy featured heavily.

In North America, we have seen the release of guidance and draft legislation on mobile apps and privacy. And the Federal Trade Commission has finalised settlements with mobile app developers and online companies involving significant amounts of money.

Here, we have seen some significant data breaches involving some well-known brands — LinkedIn, Telstra, Dell, Sony, not to mention, the hack by Anonymous of the ABC website just last week. The Australian Government introduced a discussion paper on Mandatory Data Breach Notification and the privacy law reform bill passed Parliament. We have also seen the rise of drone technology and the increasing frequency of media outlets using these devices, and the ease with which individuals can purchase them. This is an emerging area and we still do not know what privacy impacts it will have.

The continuing level of public interest in privacy confirms the importance of enhanced privacy protections for individuals, and embedding privacy-by-design in 'business as usual' processes. Privacy issues continue to make front page news and many high profile organisations have come under public scrutiny.

In 2011–12, our office received 285 media requests, a 28 percent increase on the previous year. Over 90 percent of these enquiries related to privacy.

And in the 2011–12 financial year the office received:

- 1357 privacy complaints (an increase of 11 percent from the previous year);
- around, 9000 telephone enquiries; and
- 1541 written enquiries.

We are also seeing figures from the current financial year showing that we are on track to receive even more complaints this year. It is important to note that it is not just the OAIC that receives privacy-related complaints:

- the Telecommunications Industry Ombudsman and the Financial Services Ombudsman each get close to 1,000 privacy specific complaints a year;
- some large Australian Government agencies also receive around 500 privacy complaints per year; and
- of course there are privacy regulators at the state and territory level, handling privacy complaints in their jurisdictions.

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These figures indicate that people are actively looking to exercise their privacy rights.

Of course, privacy is also increasingly of concern to businesses. Recent high profile data breaches not only demonstrate the importance of privacy protection to individuals, but also to businesses, particularly in terms of customer trust and reputation.

It is therefore no surprise that privacy law reform has become a priority for the Government as well as the public. It is fair to say that the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (the **Act**) will bring about the most significant changes in privacy regulation and compliance for over two decades.

I was very pleased to see it reported in *Lawyers Weekly* last week that privacy reform is the chief concern for corporate counsel in 2013, according to an Allens' survey of in-house lawyers. As I will explain, it is important that lawyers pay attention to these reforms as they will play a key role in assisting their clients to understand and comply with these new requirements.

The law reform process started several years ago, but on 12 March 2014 the new law will commence.

## Outline

I will now set out some of the key changes to the *Privacy Act 1988* (Cth), in particular, I look at two significant areas of reform:

- the new Australian Privacy Principles (the **APPs**); and
- the enhanced powers of the Commissioner.

I also describe how we will assist you and your clients to prepare for the changes. Finally, I briefly touch on some other important developments in privacy including:

- our new Guide to Information Security on 'reasonable steps' that can be taken to protect personal information; and
- the mandatory data breach notification discussion paper.

Let us look now at law reform.

## APPs

The APPs are one of the most important changes that you will need to be aware of as legal practitioners. The 13 new privacy principles will apply to both Commonwealth agencies and private sector organisations. These unified principles replace the existing Information Privacy Principles (the **IPPs**) and National Privacy Principles (the **NPPs**) that apply to government agencies and businesses respectively. As lawyers you will no doubt welcome the simplicity of working with one set of principles, particularly when advising clients that provide contracted services to government.

The APPs are structured to more closely reflect the information life-cycle — from notification and collection, through use and disclosure, quality and security, to access and correction. They aim to simplify privacy obligations and reduce confusion and duplication.

I want to cover some of the detail on a few of the APPs for you so I have selected some that I think will be of interest.

## APP 1 – managing personal information in an open and transparent way

The intention of APP 1 is to promote a 'privacy by design' approach — to ensure that privacy compliance is included in the design of information systems and practices from inception.

Under APP 1 an entity must take such steps as are reasonable in the circumstances to ensure compliance with the APPs or a registered APP code that binds the entity.

According to the Explanatory Memorandum to the Act, the phrase 'such steps as are reasonable in the circumstances' requires an objective assessment of the specific circumstances. Policies and practices under APP 1 could include:

- training staff and communicating to staff information about the agency or organisation's policies and practices;
- establishing procedures to receive and respond to complaints and inquiries;
- developing information to explain the agency or organisation's policies and procedures; and
- establishing procedures to identify and manage privacy risks and compliance issues.

APP 1 also requires agencies and organisations covered by the Privacy Act to have a clearly expressed and up-to-date privacy policy about the way they handle personal information. This privacy policy must contain certain information relating to the:

- kinds of personal information collected and held;
- how such information is collected and held;
- the purposes for which the entity collects, holds, uses and discloses personal information;
- access and correction procedures;
- complaint-handling procedures; and
- information about any cross-border disclosure of personal information that might occur.

This APP is a bedrock principle for all APP entities — by complying with this APP you will be establishing a workplace culture and processes that will assist you in complying with all the other APPs, right from the start.

## APP 7 Direct marketing

The new direct marketing principle (APP 7) will replace the direct marketing provisions that are currently within NPP 2 on 'Use and Disclosure' of personal information. This principle applies to all personal information, regardless of whether it was initially collected for the purpose of direct marketing or for another purpose.

Direct marketing continues to be an area of increasing community concern, particularly in the online environment where behavioural advertising targets users according to their online activity.

In privacy research conducted by the University of Queensland last year, more than half of respondents — 56 percent — disapproved of having advertising targeted to them based on their personal information. There is also evidence to suggest that with the growing prevalence of tracking and aggregation, some consumers are choosing not to use services due to privacy concerns.

APP 7.1 prohibits the use or disclosure of personal information for a direct marketing purpose, except under specific conditions. For example, if the organisation collected the information from the individual and the individual would reasonably expect the organisation to use or disclose the information for that purpose.

However, where the individual would not reasonably expect the organisation to use or disclose the information for that purpose, or it collected the information from a third party, then the organisation would need to get the consent of the individual unless that was not practicable.

In each of these scenarios the organisation will be required to provide a 'simple means' by which the individual can request not to receive any marketing. Further, in the case of the second scenario the organisation must also generally include a 'prominent statement' that the individual can make such a request in each direct marketing communication.

APP 7 also proscribes against direct marketing of sensitive information, unless the individual has consented.

Importantly, the principle will provide that individuals may ask organisations who hold their personal information to stop sending direct marketing, or to not use or disclose their personal information to facilitate direct marketing by other organisations. Individuals may also ask organisations to disclose the source of their information. Organisations must comply with such requests free of charge within a reasonable period.

A welcome reform for legal practitioners is the clarification of the application of APP 7. For example, the *Spam Act 2003* (Cth), which contains specific provisions regarding direct marketing, will displace the more general provisions under the principle. In other words, APP 7 will be displaced where another Act specifically provides for a particular type of direct marketing or direct marketing by a particular technology. But, APP 7 will still apply to organisations involved in direct marketing relating to electronic messages and other acts and practices not covered by such instruments.

## APP 8

APP 8 is an important new principle on the cross-border disclosure of personal information to an overseas recipient. APP 8.1 requires an entity to take reasonable steps to ensure that the overseas recipient does not breach the APPs in relation to the information, subject to limited exceptions set out in 8.2.

In considering APP 8.1, section 16C of the Act is also relevant. Together these provisions create a framework for the cross-border disclosure of personal information under which the disclosing entity remains accountable for the subsequent handling of that personal information by the overseas recipient. In some circumstances, the disclosing entity will be liable for an act or practice of the overseas recipient where that act or practice would breach the APPs.

So, even if an APP entity takes reasonable steps to ensure that the overseas recipient complies with the APPs, where the overseas recipient does not comply with the APPs, the disclosing entity may still be liable.

As I mentioned, this is subject to exceptions in 8.2 which include where:

- the organisation reasonably believes that the overseas organisation is subject to a law or binding scheme substantially similar to the APPs and there is a mechanism that allows an individual to seek redress; or
- the organisation expressly informs the individual that if they consent to the disclosure overseas then the organisation will not be required to take reasonable steps to ensure that the overseas recipient does not breach the APPs, and will not remain accountable for what happens to that information, and the individual consents.

This new accountability approach does not seek to prevent the cross-border disclosure of personal information. Rather it facilitates cross-border disclosure in a manner that ensures appropriate privacy protections are in place and that individuals will be able to seek redress if their information is mishandled.

## the Privacy Amendment (Enhancing Privacy Protection) Act 2012 will bring about the most significant changes in privacy regulation and compliance for over two decades

### Commissioner's New Powers

Let us turn now to look at some of the Commissioner's new powers.

#### Performance Assessments

From the date of commencement, I will be able to conduct performance assessments of private sector organisations to determine whether they are handling personal information in accordance with the APPs, the new credit reporting provisions and other rules and codes.

The power consolidates the existing discretion I have to conduct audits of Australian Government Agencies, tax file number recipients, credit reporting agencies, credit providers and extends it to include organisations. The assessments may be conducted at any time — an added incentive for organisations to ensure they are handling personal information in accordance with the Privacy Act. So I will be putting businesses on notice that they need to have their systems and processes in place to be ready at all times for a performance assessment.

#### Code Making Powers

I also have enhanced code making powers under Part IIIB of the Act; these have been a bit of a sleeper. In summary, the code making powers will allow me to approve and register enforceable codes developed by entities or by the Commissioner directly.

APP entities are able to develop written codes of practice for the handling of personal information, called APP codes. These codes set out how one or more of the APPs are to be applied or complied with, and the APP entities that are bound by the code. The Act also requires the development of a code of practice about credit reporting, called the CR Code. This code will set out how the Act's credit reporting provisions are to be applied or complied with by credit reporting bodies and providers. I have asked the Australasian Retail Credit Association to develop this.

## Own Motion Investigations

An important new addition to the privacy compliance model is that from the first day of operation, the privacy reforms will provide me with enforcement powers and remedies in regards to investigations that I have commenced on my own initiative — we refer to them as own motion investigations. I will be able to make a determination — as I can already with a complaint lodged by an individual, accept written undertakings that will be enforceable through the courts, or apply for civil penalty orders which can be up to \$340,000 for individuals and up to \$1.7 million for companies. These powers also extend to certain entities' handling of credit information, tax file number information and health information.

## Regulatory Approach

As I have been telling businesses and government since I became Privacy Commissioner in mid-2010, my focus will always be on resolving the majority of complaints via conciliation. However, I will not shy away from using new and existing powers where it is appropriate to do so.

## To ensure compliance, businesses and government agencies need to start thinking now about what these changes mean in terms of current privacy policies and business processes and practices.

I have been asked about what my enforcement approach will be, specifically whether I will be taking a 'softly, softly' approach after implementation of the reforms. Well I have never been known to be subtle so the answer to that question is probably 'no'. Now before people get too excited about the bluntness of that response remember that I said I would always start by trying to resolve matters through conciliation. Having said that, let us remember that the public sector have been working with the Privacy Act for nearly 25 years and the private sector for over 12 years, these concepts are not new. Fundamentally the principles remain the same. If we take what will be the new APP 11 as an example, organisations are required to take reasonable steps to protect the personal information they hold. This is not a new requirement and in my view it should already be happening.

Let us now look at the resources our office is working on for you to use in your work.

### OAIC guidance and resources

Our Office has a role to educate all organisations and agencies, as well as the community more generally, about the changes that are coming under the reforms, including the APPs, credit reporting and our new functions and powers. We are doing this on a very limited budget, having received no additional funding from government, so it is encouraging to see that a number of law firms are already producing and disseminating helpful guidance on these important changes.

We have already commenced developing guidance to assist agencies and businesses.

The upcoming resources will include:

- a comparison guide between the IPPs/NPPs and APPs;
- guidelines on the APPs;
- code-making guidelines (which will be released for consultation next week); and
- revised Privacy Impact Assessment and Data Breach Notification guides.

Reference to these resources will be essential when advising clients on what the new law requires, and what changes clients need to make to their personal information handling policies and practices.

To ensure compliance, businesses and government agencies need to start thinking now about what these changes mean in terms of current privacy policies and business processes and practices.

Some key issues that lawyers should be raising with clients include:

- the review and updating of privacy policies and notices;
- outsourcing arrangements, particularly if these involve the disclosure of personal information outside Australia;
- the circumstances where personal information can be used for direct marketing, sent overseas, or for credit reporting purposes; and
- direct marketing practices, including the availability of 'opt out' mechanisms.

We also have a range of other important responsibilities in the lead up to the commencement of the reforms, including the drafting of binding rules and statutory instruments. We are planning for this material to be ready over the next few months.

We will be conducting targeted public consultation processes to assist us in developing this guidance. I would encourage you to contribute to these consultations, so we can arrive at guidance that is practical and meets the needs of business.

We will be using our various existing communication channels to get the word out and if you have not already done so, I encourage you to sign up with the Privacy Connections Network, our network for private sector privacy professionals.

## Mandatory data breach notification

I mentioned to you earlier that we had seen the Government publish a discussion paper on mandatory data breach notification in October 2012. This was a parallel development not covered by the privacy law reform Bill.

As many of you know, I support the amendment of the Privacy Act to require mandatory data breach notification in certain circumstances. The OAIC made a submission in response to the Government's issues paper and it will be very interesting to see how this issue develops.

In addition to the risks to individuals, data breaches also pose a serious reputational risk to business. This 'cost' is in addition to other costs associated with data breaches. Some research estimates the costs of data breaches to be in the millions of dollars. An even greater reputational risk confronts organisations perceived to be either hiding a breach, or not acting on it. Ultimately, this affects consumer trust and the number of return customers. This is perhaps one of the reasons why organisations I have previously investigated have been extremely cooperative in working with us to resolve the issues.

## Conclusion

I will conclude by saying that it is an exciting time to be working in the privacy field — the large scale of these reforms present interesting challenges and opportunities for all of us as privacy laws are brought up to date with technology and contemporary international approaches to privacy regulation. It also means that it is more important than ever for organisations to be vigilant when handling personal information.

I am certain that this will be a busy year for all of us. It has been a pleasure speaking to you all this evening and I hope that you will join us in getting the message out about the challenges and opportunities that the privacy reforms present. Thank you.

**Timothy Pilgrim, the Australian Privacy Commissioner, presented a longer version of this speech to CAMLA members and guests on 7 March 2013 at Henry Davis York Level 10, 44 Martin Place Sydney. The full version of the speech is available at <http://www.camla.org.au>**



# Social Gaming and Online Gambling

Stephanie Essey examines the blurring of the distinction between prohibited online gambling and social gaming, and the recently released report proposing measures to address online gambling services.

## Introduction

The line between prohibited online gambling and social gaming is becoming increasingly blurred, with the resulting ambiguity posing risks to social media users, especially vulnerable individuals such as children. Senator Stephen Conroy, the Minister for Broadband, Communications and the Digital Economy, drew attention to the issue in a recent media release:

The Review [of the *Interactive Gambling Act 2001*] ... identified concerns in relation to casino-style gambling simulations being accessed through a variety of platforms including social media, and the potential risk that this may pose to children. I will be writing to the providers of these games and social networking services to seek more information about how they are addressing these issues.<sup>1</sup>

The Department's *Final Report 2012 – Review of the Interactive Gambling Act 2001 (the Final Report)*, released on 12 March 2013, advocated monitoring the provision of online gambling-style services so that they do not target or mislead children by providing unrealistically favourable payout ratios.<sup>2</sup> It also proposed international consultation with regulators about measures to address children's access to online gambling-style services and the marketing of those services to children.<sup>3</sup> The Report acknowledged that games played on social media and other platforms are becoming markedly similar to real-money gambling.<sup>4</sup> Further, it registered concerns regarding the advertisement of prohibited services via social media and other platforms, given that such advertising is prohibited by the *Interactive Gambling Act 2001* (the *IGA*).<sup>5</sup>

## Social gaming worldwide

Similar regulatory questions have arisen in other jurisdictions. The UK Gambling Commission announced in January 2013 that it was formally assessing the risks associated with social gambling. The Gambling Commission is particularly concerned about the practices of unscrupulous operators and the possibility of social gaming lead-

ing to problem gambling amongst young people or others who are vulnerable. It is considering whether consumer protection might be necessary in light of the "increasing convergence between the products of traditional gambling and social gaming businesses".<sup>6</sup> Further, in April 2013, the UK Office of Fair Trading (the *OFT*) instituted an investigation into free games and in-app purchases online and on mobile devices. The investigation is aimed at determining whether children are unfairly targeted and encouraged to purchase items like virtual currency, virtual goods or status upgrades. The OFT is seeking to ensure that providers of social gaming are not misleading consumers and are complying with consumer regulations.<sup>7</sup>

## Many social games are not prohibited under the IGA because they are not caught by the Act's definition of a "gambling service"

In the US, a class action was recently brought against Apple by a group of parents in connection with in-app purchases within "free" iPhone games. Their children had made purchases without parental permission while playing games like "Zombie Café" and "City Story".<sup>8</sup> The case was settled in March 2013, with Apple providing compensation to class members who could number in the millions.<sup>9</sup>

## Social gaming: on the fringe of the Interactive Gambling Act

Under the IGA, it is an offence to intentionally provide an "interactive gambling service" to customers physically present in Australia.<sup>10</sup> An interactive gambling service is a "gambling service"<sup>11</sup> which is provided to customers as a business via a carriage service, a broadcasting service, any other content service or a datacasting service.<sup>12</sup> Many social games are not prohibited under the IGA because they are not caught by the Act's definition of a "gambling service".<sup>13</sup> This

1 Senator Stephen Conroy, media release: 'Strengthened consumer protection for online gambling', 12 March 2013: [http://www.minister.dbcde.gov.au/media/media\\_releases/2013/035](http://www.minister.dbcde.gov.au/media/media_releases/2013/035).

2 Senator Stephen Conroy, media release: 'Strengthened consumer protection for online gambling', 12 March 2013: [http://www.minister.dbcde.gov.au/media/media\\_releases/2013/035](http://www.minister.dbcde.gov.au/media/media_releases/2013/035).

3 Recommendation 31, Final Report, pp 21, 146.

4 Final Report, pp 141-3.

5 Final Report, pp 131, 137-8.

6 Social media, gaming and gambling', Gambling Commission (UK):

[http://www.gamblingcommission.gov.uk/research\\_consultations/gambling\\_research/research\\_programme/social\\_media\\_gaming\\_and\\_gambl.aspx](http://www.gamblingcommission.gov.uk/research_consultations/gambling_research/research_programme/social_media_gaming_and_gambl.aspx).

7 Office of Fair Trading, press release: 'OFT investigates free children's web and app-based games', 12 April 2013: [http://www.offt.gov.uk/news-and-updates/press/2013/33-13#\\_UWey9KtARXc](http://www.offt.gov.uk/news-and-updates/press/2013/33-13#_UWey9KtARXc).

8 Nadia Mozzafar, 'Zombie Toxin and Gems: When "Virtual Currency" Costs Real Money', *JETLaw: Vanderbilt Journal of Entertainment & Technology Law*, 22 April 2011: <http://www.jetlaw.org/?p=6297>.

9 Manatt Phelps & Phillips LLP, 'Apple, parents reach deal on in-app purchases', *Lexology*, 15 March 2013: <http://www.lexology.com/library/detail.aspx?g=172a29f4-cf04-47f6-8c3b-3d83ad5c2ee4>.

10 s15, IGA.

11 s4, IGA.

12 s5, IGA.

13 s4, IGA.

## while many gaming providers' terms may indicate that they do not endorse virtual currency trading, the existence of markets for virtual items suggests that those items may well be of some monetary value

is primarily because many are not played for money or, arguably, for "anything else of value".<sup>14</sup> However, many of these games otherwise come very close to satisfying the three-limb test for a "service for the conduct of a game", which comprises one component of the IGA's "gambling service" definition.

The definition of a "gambling service" in section 4 of the IGA includes the following:

- (e) a service for the conduct of a game, where:
  - (i) the game is played for money or anything else of value; and
  - (ii) the game is a game of chance or of mixed chance and skill; and
  - (iii) a customer of the service gives or agrees to give consideration to play or enter the game; or
- (f) a gambling service (within the ordinary meaning of that expression) that is not covered by any of the above paragraphs.

Many social games are games of chance or mixed chance and skill. Popular games like Slotomania and Zynga Slingo are based on casino-style slot machines (which are combined with bingo in Zynga Slingo). Doubledown Casino provides an array of casino-style games such as slots, blackjack and roulette. Poker is another prevalent format, found in games like Zynga Poker and Poker Palace.

Players are often required to provide consideration to enter or play these games. As the Final Report notes, numerous games (particularly apps) require upfront payments in order to play.<sup>15</sup> Even where games are free to enter, real money can routinely be used to buy virtual currency or to procure various advantages while playing.<sup>16</sup>

Virtual currency, virtual goods or prizes won within games could arguably constitute "anything else of value", particularly given the fact that there are online second-hand markets for many of the items (for instance, Zynga Poker Chips). Virtual goods and currency are regularly traded online, although contractual provisions in gaming operators' terms and conditions usually seek to prohibit this type of conduct.<sup>17</sup> However, while many gaming providers' terms may indicate that they do not endorse virtual currency trading, the existence of markets for virtual items suggests that

those items may well be of some monetary value. Indeed, in recent cases, including in the UK and the Netherlands, virtual goods and property have been treated as "legal property capable of being alienated for value".<sup>18</sup> This construction places social games at the very perimeter of "gambling services" as they are demarcated by the IGA.

Also, there is competitive and social value in some virtual items, because of the ability to "buy" gifts for friends with virtual currency or post notifications of prizes received on Facebook. Perhaps for this reason, the sale of virtual goods accounts for about 60 cents of every dollar of revenue social gaming operators earn.<sup>19</sup> However, the Final Report takes the conventional view that virtual currency is not redeemable for money or "anything else of value".<sup>20</sup>

The key risk is that while many examples of social gaming might not technically satisfy the IGA's definition of a "gambling service", another view is that they are, in fact, a modern, electronic form of delivering gaming content that has some gambling elements. More extreme examples of social gaming threaten to normalise gambling and render it appealing, which can prove particularly dangerous for children.<sup>21</sup> Crucially, there are limited legislative measures to prevent these activities, which are very similar to gambling, from occurring unregulated via social media.

## the sale of virtual goods accounts for about 60 cents of every dollar of revenue social gaming operators earn

### Case study: Zynga Poker

Zynga Poker is the largest social casino game on Facebook and ranks in the five top-grossing iPhone and iPad casino apps in the US.<sup>22</sup> It operates on several platforms, including Facebook, Zynga.com, Google+, iPhone, iPad and Android. Zynga Poker is a game of combined skill and chance.<sup>23</sup>

It is free to begin playing Zynga Poker. Zynga Chips are required to play, and users are provided with free chips when they start playing and each time they log in to the game. Chips are also made available via various in-game offers and lotteries. Within the game, players are able to buy Zynga Chips with real money (or with third-party virtual currency, including Facebook Credits). If players run out of chips, they need to purchase more chips in order to continue playing. As a result, users provide consideration in order to play the game.<sup>24</sup> Chips can be sent to or received from other players.

Although Zynga states that chips are not to be exchanged for money, Zynga Chips are extensively resold in a secondary market online. This conduct is prohibited by Zynga's Terms of Service, which state at clause 1.11.3 ("Virtual Items") that:

14 s4, IGA.

15 Final Report, p 142.

16 Final Report, p 139.

17 Matt Pollins, 'Social gaming: on a collision course with gambling regulation?', 9 July 2012: <http://www.olswang.com/articles/2012/07/social-gaming-on-a-collision-course-with-gambling-regulation/>.

18 Jas Purewal, Osborne Clarke, 'The converging worlds of social gaming and gambling', *World Online Gambling Law Report*, June 2012, p 8.

19 GamblingData, *Gambling Data Social Gaming White Paper 2012*, October 2012, p 3: <http://www.gamblingdata.com/files/SocialGamingDataReportOct2012.pdf>.

20 Final Report, p 141.

21 Ibid.

22 GamblingData, *Gambling Data Social Gaming White Paper 2012*, October 2012, pp 3, 7 and 9: <http://www.gamblingdata.com/files/SocialGamingDataReportOct2012.pdf>.

23 See (e)(ii), "gambling service", s4, IGA.

24 See (e)(iii), "gambling service", s4, IGA.

## The Final Report emphasises the difficulty of appropriately controlling the scope of legislative prohibitions, as well as the challenges posed by the requisite global enforcement

Zynga owns, has licensed, or otherwise has rights to use all of the content that appears in the Service. Notwithstanding any provision to the contrary herein, you agree that you have no right or title in or to any content that appears in the Service, including without limitation the Virtual Items appearing or originating in any Zynga game, whether “earned” in a game or “purchased” from Zynga, or any other attributes associated with an Account or stored on the Service.

Zynga prohibits and does not recognize any purported transfers of Virtual Items effectuated outside of the Service, or the purported sale, gift or trade in the “real world” of anything that appears or originates in the Service, unless otherwise expressly authorized by Zynga in writing. Accordingly, you may not sublicense, trade, sell or attempt to sell in-game Virtual Items for “real” money, or exchange Virtual Items for value of any kind outside of a game, without Zynga’s written permission. Any such transfer or attempted transfer is prohibited and void, and will subject your Account to termination.<sup>25</sup>

The fact that the resale of chips for real money occurs widely (in spite of Zynga’s Terms and the company’s efforts to detect and prevent fraud) arguably makes Chips something “of value” under section 4 of the IGA.<sup>26</sup>

Users are initially provided with eight units of Casino Gold, but can purchase additional Gold. Casino Gold is not transferable between players. Given that it allows users to skip rounds, gain entry to exclusive tournaments and purchase Premium Gifts, Casino Gold might also constitute something “of value” to users.<sup>27</sup>

Zynga has also recently begun to provide real-money online poker and casino games, ZyngaPlusPoker and ZyngaPlusCasino.<sup>28</sup> Although at this stage this development has only occurred in the UK, it suggests that social gaming could serve as a gateway to real-money gambling.

### The future of social gaming in Australia

Various commentators have proposed methods of regulating social gaming. Senator Nick Xenophon has advocated amending the scope of the IGA’s definition of a “gambling service” to ensure that social gaming is covered.<sup>29</sup> The Final Report discusses

but does not adopt similar suggestions. It emphasises the difficulty of appropriately controlling the scope of legislative prohibitions, as well as the challenges posed by the requisite global enforcement.<sup>30</sup> Ultimately, the Report and the Minister endorse further consultation, research and monitoring rather than more active measures.<sup>31</sup>

The Final Report also canvasses the addition to the IGA of a civil penalty regime addressing the provision of prohibited services. Under such a regime, the Australian Communications and Media Authority (the **ACMA**) might be made responsible for issuing infringement notices, enforcing penalties and seeking injunctive relief for breaches of the civil penalty provisions.<sup>32</sup> Alternatively, social gaming could be addressed via an industry code or standard. The use of industry codes is being considered in other jurisdictions, such as the UK.<sup>33</sup> In Australia, the Interactive Gambling Industry Code was developed by the Internet Industry and Association and is registered with ACMA pursuant to the IGA.<sup>34</sup> It applies to internet service providers (**ISPs**) and does not specifically address social gaming. Ultimately, though, a code applying at the ISP level (the only type of code the IGA contemplates) could be too blunt an instrument with which to address the subtle and varied phenomenon of social gaming.

## Both visually and in their addictive appeal, many social games increasingly mimic real-money gambling

Social games are becoming markedly similar to more traditional forms of online gambling. Both visually and in their addictive appeal, many social games increasingly mimic real-money gambling. Access to these games is often unrestricted and players are enticed to spend real money. In spite of these risks, social gaming operates outside the sphere of regulation. With the global social gaming market set to boast 1.5 billion players and generate \$14.6 billion in annual revenue by 2015,<sup>35</sup> concerns about the way it is conducted and monitored are likely to persist.

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**The views expressed in this article are the views of the author only and do not represent the views of any organisation.**

25 Zynga, “Terms of Service”, last updated 30 September 2011: <http://company.zynga.com/legal/terms-of-service>.

26 See (e)(i), “gambling service”, s4, IGA.

27 See (e)(i), “gambling service”, s4, IGA.

28 Trevor Mogg, ‘Online gambling: Zynga bets on real-money games to bring in the cash with UK launch’, *Digital Trends*, 3 April 2013: <http://www.digitaltrends.com/international/zynga-launches-real-money-gambling-games-in-uk/>.

29 Nick Xenophon in bid to close gambling app loophole’, *The Australian*, 13 January 2013: <http://www.theaustralian.com.au/national-affairs/nick-xenophon-in-bid-to-close-gambling-app-loophole/story-fn59niix-1226552960088>.

30 Final Report, pp 141-2.

31 Final Report, pp 144-5; Senator Stephen Conroy, media release: ‘Strengthened consumer protection for online gambling’, 12 March 2013: [http://www.minister.dbcde.gov.au/media/media\\_releases/2013/035](http://www.minister.dbcde.gov.au/media/media_releases/2013/035).

32 Final Report, p 67.

33 ‘Social media, gaming and gambling’, Gambling Commission (UK): [http://www.gamblingcommission.gov.uk/research\\_\\_consultations/gambling\\_research/research\\_programme/social\\_media\\_gaming\\_and\\_gambl.aspx](http://www.gamblingcommission.gov.uk/research__consultations/gambling_research/research_programme/social_media_gaming_and_gambl.aspx).

34 Part 4, IGA; Internet Industry Association, ‘Interactive Gambling Industry Code, December 2001’, ACMA: [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_90087](http://www.acma.gov.au/WEB/STANDARD/pc=PC_90087).

35 GamblingData, *Gambling Data Social Gaming White Paper 2012*, October 2012, pp 3-4: <http://www.gamblingdata.com/files/SocialGamingDataReportOct2012.pdf>.

# Google Not Responsible for Third Party Search Advertisements

Andrew Walsh takes a look at the recent High Court decision and what it may mean for search advertising providers and businesses in the future.

## Introduction

In a much anticipated and recent judgment,<sup>1</sup> the High Court unanimously held that Google Inc (**Google**) did not engage in misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth)<sup>2</sup> (the **Act**) through the publication or display of 'sponsored links', even though the sponsored links themselves were misleading or deceptive.

The decision has broad implications for providers and acquirers of search advertising, but also for trade mark owners and businesses the subject of misleading or deceptive search advertisements taken out by their competitors.

This article explores the key technical features of Google's sponsored links and its AdWords service. It then analyses the decisions of the High Court and the Courts below, and goes on to discuss the implications of these decisions.

**the Full Court found that Google was making the representations in the sponsored links as a principal and not merely acting as a conduit passing on advertisements of third parties**

## Sponsored links and the Google AdWords service

Between 2005 and 2008, the period relevant to the Case, the Google search engine displayed two types of search results in response to a user's search query: 'organic search results' and 'sponsored links'. Organic search results were links to web pages that were ranked in order of relevance to the search query, determined by Google's proprietary algorithms. Sponsored links, on the other hand, were a form of advertisement, created by or at the direction of an advertiser. The advertiser would pay Google each time the sponsored link was 'clicked' by a user. Sponsored links were displayed as part of the search results when certain words or phrases chosen by the advertiser, known as 'keywords', were included in a search query. They were labelled 'sponsored links' and were distinguished from organic search results by shading and screen location.

Sponsored links were supplied by Google through its 'AdWords' service. A key feature of the AdWords service was the use of 'keyword insertion' coding. The coding enabled advertisers to include some of the words or phrases from a search query in the headline of the sponsored link itself. In effect, the user's own words would be played back to them in the search results, making the sponsored link appear more relevant to the user.

Today, Google's AdWords service continues to work in a similar way, except that sponsored links are now referred to as 'Ads' or 'AdWord advertisements' and are presented slightly differently on screen. Other search providers supply similar search advertising services, such as Bing and Yahoo! through the Yahoo! Bing Network.

## Claims of misleading or deceptive conduct

In 2007, the Australian Competition and Consumer Commission (the Commission) brought proceedings against Google in the Federal Court.<sup>3</sup>

The Commission claimed that Google had contravened s 52 of the Act by publishing or displaying 11 sponsored links that misrepresented associations or affiliations between businesses and misrepresented that the web pages to which the hyperlinks led would contain information concerning certain businesses.

One such sponsored link belonged to STA Travel, a well-known travel agent. A user of the Google search engine who searched the phrase 'harvey world travel' (a competitor of STA Travel) would be presented with search results including the following sponsored link, which hyperlinked to the STA Travel website:

*'Harvey Travel  
Unbeatable deals on flights, Hotel & Pkg's Search, Book & Pack Now!  
www.statravel.com.au'*

Interestingly, the Commission claimed that Google had contravened s 52 directly. It did not rely on s 75B of the Act<sup>4</sup>, which provided that a person who had 'aided, abetted, counselled or procured the contravention' of s 52 was 'involved in [the] contravention' for the purpose of the enforcement and remedies provisions of Part VI of the Act.

The Commission also claimed that Google had engaged in conduct contrary to s 52 by failing to sufficiently distinguish between organic search results and sponsored links. This claim was dismissed at first instance<sup>5</sup>, and is not considered further in this article.

## At first instance in the Federal Court

The primary judge, Justice Nicholas, held that the sponsored links were misleading or deceptive, or likely to mislead or deceive.<sup>6</sup> Significantly, however, Nicholas J said that Google did not 'make' those representations. It was acting 'merely as a conduit', passing on the advertisements of others without endorsing or adopting them.<sup>7</sup>

His Honour held that ordinary and reasonable members of the relevant class of consumers who might be affected by the alleged conduct (being people with basic knowledge and understanding of computers, the web and search engines) would have understood

1 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 (6 February 2013) (the **Case**).

2 Now, s 18 of the *Australian Consumer Law*.

3 Claims were also brought against Trading Post (an advertiser), but these claims were settled and did not proceed to hearing.

4 Now, s 75B of the *Competition and Consumer Act 2010* (Cth).

5 *ACCC v Trading Post* (2011) 197 FCR 498 at 533-536.

6 *Ibid* 536-573.

7 *Ibid* 536-544.



that sponsored links were third party advertisements (as distinct from organic search results)<sup>8</sup> and that Google had not endorsed them and was not responsible in any meaningful way for their content.<sup>9</sup>

## Appeal to the Full Court

The Commission appealed to the Full Court in relation to the primary judge's finding that Google did not 'make' the representations contained in the sponsored links, but had acted 'merely as a conduit'. The finding, that the advertisements were themselves misleading or deceptive, was not challenged.

The Full Court (Keane CJ, Jacobson and Lander JJ) unanimously allowed the appeal, finding that Google had itself contravened s 52.<sup>10</sup> Their Honours held that the publishing or display of a sponsored link was, in fact, a response by Google to a search query.<sup>11</sup> Much emphasis was placed on this notion of 'response' in the Full Court's decision.

By publishing or displaying a sponsored link in response to a search query, the Full Court found that Google was making the representations in the sponsored links as a principal and not merely acting as a conduit passing on advertisements of third parties. The fact that the keywords and headlines were chosen by the advertiser did not, according to the Full Court, mean that the sponsored links were any less Google's response to the search queries.<sup>12</sup>

The notion of 'response' was also used by the Full Court to distinguish Google from traditional conduits or intermediaries, like newspaper publishers or television broadcasters who simply publish or display advertisements of others.<sup>13</sup>

## Appeal to the High Court

Google was granted special leave to appeal to the High Court. Google argued that all of the relevant aspects of the sponsored links – the headline, the advertising text, the URL, the keywords and the use of keyword insertion – were specified by the advertiser and Google was merely implementing the advertiser's instructions. The fact that the sponsored links were published or displayed in response to the user's search query was insufficient to establish Google's liability under s 52.

Google also argued that its technical facilities were not different, in principle, to the facilities provided to advertisers in other traditional mediums. It claimed that commercial associations or affiliations between an advertiser and third parties were something peculiar to the knowledge of the advertiser and not within Google's expertise.

The High Court unanimously allowed the appeal and set aside the Full Court's decision. A variety of specific reasons were given by the High Court, but they are best understood as illustrations of two main themes:

1. **Google did not 'make', in any authorial sense, the sponsored links that it published and displayed.** To this end, the High Court noted that Google did not control the search terms employed by the users of its search engine or the keywords chosen by its advertisers<sup>14</sup>; the content of sponsored

links and the keywords that trigger their publication or display were chosen by the advertiser,<sup>15</sup> (despite some evidence that Google employees had low level involvement in the selection of some keywords); and the Google search engine automatically produced search results based on its proprietary algorithms, which merely assemble information provided by its users and advertisers and this did not, therefore, distinguish Google from other traditional intermediaries, like newspaper publishers or television broadcasters who simply publish or display advertisements of others.<sup>16</sup>

2. **Ordinary and reasonable users would have understood that sponsored links were statements made by advertisers, which Google had not endorsed and was merely passing on for what they are worth.** To this end, it was noted that sponsored links were labelled 'Sponsored Links' and contained the URL of the advertiser, and that the primary judge's original findings in this regard were 'plainly correct'.<sup>17</sup>

## If the High Court had found that Google was more directly involved in the making of the sponsored links or had crossed the line into endorsing or adopting the sponsored links, the case may have been determined differently

The High Court clearly placed greater emphasis on the notion that sponsored links were the result of automated assembly of third party inputs, an algorithmic process triggered by the search query. This approach is distinct from the Full Court, which emphasised the notion that sponsored links were representations made in direct response to a search query. It is a reasonably subtle distinction.

Interestingly, the High Court also considered some of the practical implications of a finding against Google, which are reflective of the commercial realities and technological underpinnings of search businesses generally.

The majority (French CJ, Crennan and Kiefel JJ) considered the difficulties that would be encountered by Google if it were required to determine whether a sponsored link created by an advertiser might contravene s 52. The commercial associations or affiliations between advertisers and the web pages to which their sponsored links are directed, is not within Google's expertise.<sup>18</sup>

Heydon J, in a separate judgment, thought that it would be a 'very extreme conclusion' if in all cases Google was held to make the representations contained within the sponsored links of its advertisers. Such a finding would put Google (and others in the position of Google) at risk of committing numerous contraventions of the Act when producing search results.<sup>19</sup>

8 Ibid 533-534.

9 Ibid 540-542.

10 *ACCC v Google* (2012) 201 FCR 503, 521-522 and 524.

11 Ibid 521.

12 Ibid 520-521.

13 Ibid 522.

14 *Google Inc v ACCC* [2013] HCA 1, [67].

15 Ibid [68].

16 Ibid [69].

17 Ibid [70].

18 Ibid [72].

19 Ibid [143].

## For advertisers, the decision is a clear reminder of their responsibility to ensure their advertisements are not misleading or deceptive or likely to mislead or deceive

It is also interesting to consider the divergence in the High Court's decision in relation to liability for publication of misleading or deceptive advertisements.

French CJ, Crennan, Kiefel and Heydon JJ said that a publisher of a misleading or deceptive advertisement would ordinarily only engage in conduct contrary to s 52 if the publisher has adopted or endorsed the representations.

Hayne J, on the other hand, considered that publication, by itself, may be sufficient to constitute conduct contrary to s 52 and that concepts of adoption or endorsement have no footing in the words of s 52 itself.<sup>20</sup>

The contention between the two approaches is interesting and it would not be surprising to see more made of this in later appropriate cases.

### Implications for search advertising providers

The decision is a significant win for Google and other search advertising providers.

In Google's case, the vast majority of its revenue is generated from advertising (more than USD 43 billion in 2012, with year on year growth of 20%)<sup>21</sup> and a loss in this case would have been a blow to its current business and growth potential in Australia (estimated to be in the order of AUD 1-1.5 billion annually).<sup>22</sup> A requirement for search advertising providers to compliance check every search advertisement they received would drive complexity into their operations and increase costs. It would also affect their competitiveness against more traditional mediums of advertising. In this regard, the decision effectively levels the playing field between providers of search and traditional advertising, at least in respect of liability under s 18 of the *Australian Consumer Law* for representations in the advertisements they publish or display.

The decision also means that search advertising providers have become smaller targets for trade mark owners and businesses suffering detriment from misleading or deceptive search advertisements taken out by their competitors, provided, of course, that search advertising providers do not cross the line into endorsing or adopting the representations. The Full Court's decision (now set aside by the High Court) supported the making of s 18 claims against search advertising providers by aggrieved trade mark owners and businesses.

In considering the implications of this judgment, it is important to remember that the High Court's decision was very much determined by the facts of the case, particularly the absence (or low levels) of Google's involvement in choosing keywords (which the High Court held was the domain of advertisers) and search terms (the domain of users). If the High Court had found that Google was more directly involved in the making of the sponsored links or had crossed the line into endorsing or adopting the sponsored links, the case may have been determined differently.

Whether the decision continues to provide cover for search advertising providers will depend on how their commercial offerings and search technologies evolve over time. They will need to take care to stay behind the lines set by the High Court's decision. User-friendly search features, like search term auto-complete (all the major search providers offer this) and functions like the 'push' of search results to mobile devices (for example, based on geo-location data, something which is becoming more prevalent), are some of the factors that need to be considered in this context.

### Implications for advertisers

For advertisers, the decision is a clear reminder of their responsibility to ensure their advertisements are not misleading or deceptive or likely to mislead or deceive. In the case of search advertisements, issues can arise from obvious matters, like using a competitors' name or trade marks (lawful comparative advertising aside), and less obvious matters, like combinations of keywords, ad headings, ad text and hyperlinks. In response to the decision, the Association for Data-Driven Marketing and Advertising has announced plans to release guidelines to assist advertisers in navigating these issues. The guidance is expected to be released in May 2013.<sup>23</sup>

## Google will no longer investigate or restrict the use of trade mark terms in keywords (as distinct from the text of AdWord advertisements), even if a trade mark complaint is received

### Implications for trade mark owners and businesses generally

The biggest losers from the decision are trade mark owners and businesses the subject of misleading or deceptive search advertisements taken out by their competitors. As noted previously, the decision effectively eliminates a course of action that might previously have been available to them.

Google's 'AdWords Trademark Policy' offers some relief. Under the policy, trade mark owners can make a complaint to Google regarding the use of their trade marks in the *text* of AdWord advertisements. Google promises to investigate these complaints and may restrict the use of that trade mark in the text of the AdWord advertisement.<sup>24</sup>

But, here too it seems trade mark owners have been dealt another blow. As of 23 April 2013, little more than two months after the High Court decision, Google changed its 'AdWords Trademark Policy'. Google will no longer investigate or restrict the use of trade mark terms in keywords (as distinct from the text of AdWord advertisements), even if a trade mark complaint is received.<sup>25</sup> While the change is part of a larger global initiative of Google to align its AdWords policies worldwide, it is a neat fit with the timing and substance of the decision.

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20 Ibid [99].

21 Google, *Investor Relations* <<http://investor.google.com/financial/tables.html>> (retrieved 1 May 2013).

22 Australian Financial Review, 'Google tax bill boost won't deter Gillard tax grab', 1 May 2013, p 6.

23 See further: ADMA, 'High Court Ruling Finds Google Not Guilty' (13 February 2013) <http://www.adma.com.au/connect/articles/high-court-ruling-finds-google-not-guilty/> (retrieved 1 May 2013).

24 Google, *Adwords Trademark Policy* <http://support.google.com/adwordspolicy/answer/6118?hl=en> (retrieved 1 May 2013).

25 Ibid.

# The Evolution of Live Streaming

Matthew Tracey examines the treatment by the courts of three online free-to-air television streaming services in Australia, the United Kingdom and the United States of America.

## Introduction

Free to air television has traditionally generated revenue for broadcasters through advertising and retransmission by subscription television. This model has been reliably protected through the copyright that subsists in a broadcast and the exclusive rights allocated to the broadcaster that allow them to charge third parties for access.

The market for online content has risen exponentially in recent years as the proliferation of bandwidth and portable devices can provide high-quality transmission for more people in more places. The precise boundaries of the copyright that subsists in a television broadcast have been tested recently in three different countries. Accordingly, the owners of those exclusive rights have had their future profitability challenged by new technological models.

This article examines the extent to which system architecture has defined the legality of three online free-to-air television streaming services: Optus' TVNow in Australia, TVCatchup in the United Kingdom and Aereo in the United States.

## Optus

Optus, the number two telecommunications provider in Australia, launched 'TVNow' in late 2011. TVNow allowed Optus customers to instruct Optus servers to record live free-to-air television and store the contents in the cloud. TV Now operated as a personal video recorder in a closed IP environment. At the time of its launch, Optus made it clear that playback of the recorded content is undertaken on a one-to-one basis and is not 'broadcasting.' The TVNow service could be used to view broadcast television including sports that were available on the free-to-air channels.

The National Rugby League (the **NRL**) and the Australian Football League (the **AFL**), as the rights holders in their respective sporting codes, granted an exclusive licence to Telstra for the right to stream live NRL and AFL matches on its BigPond service. The NRL, AFL and Telstra subsequently brought proceedings against Optus in the Federal Court of Australia for breach of copyright in a broadcast. Rares J, at first instance, found that the recordings were made by the subscriber not Optus and fell within an exception to time-shift recording under section 111 of the *Copyright Act 1968* (Cth) (the **Australian Copyright Act**) which allows a person to make a recording of a broadcast for private and domestic use by watching it at a more convenient time; also known as time-shifting.

On appeal to the Full Federal Court, Rares J's decision was overturned as the Court found that the recording was made jointly by Optus and the subscriber and the s111 exception was not applicable. In a joint judgment of the Full Federal Court, Finn, Emmett and Bennett JJ noted:

we consider that Optus' role in the making of a copy – ie in capturing the broadcast and then in embodying its images and sounds in the hard disk – is so pervasive that, even though entirely automated, it cannot be disregarded when the "person" who does the act of copying is to be identified.<sup>1</sup>

The High Court of Australia refused Optus' leave for an appeal.

In the wake of the Full Federal Court's decision, Optus has urged the Australian Law Reform Commission to amend the Australian Copyright Act so as to facilitate the sharing of copyright material amongst different technology devices and platforms:

It is important to ensure third parties that merely provide the essential connectivity between creators and users are not inadvertently caught on the wrong side of the law by virtue of activities that should not be properly considered as infringing upon right holders' interests.<sup>2</sup>

The Optus decision in the Full Federal Court is focussed more on the recording of the broadcasting by Optus (or Optus and the subscriber jointly) than on the communication of that recorded broadcast to the public. This is in part due to the defence available under s111 of the Australian Copyright Act that Optus submitted should apply to the service. The trial judge, Rares J, concluded with some brevity that the TVNow service did not constitute a communication to the public where the recording was requested by an individual and viewed by that individual for their private purposes. Despite this, the Full Federal Court's focus on the recording (as opposed to the subsequent communication) of the broadcast meant that this issue wasn't explored fully on appeal.

**the owners of exclusive rights have had their future profitability challenged by new technological models**

## TVCatchup

TVCatchup, a service offering live streaming of free-to-air television to UK residents, was found to have breached copyright in a broadcast. TVCatchup encoded separate streams for each of its users and only provides those streams to people in the UK who hold a valid TV licence - that is, those people who would otherwise be able to view the free-to-air broadcast.

The claim was initially commenced in the UK High Court of Justice (the **HCJ**) by ITV, Channel 4 and Channel 5. The HCJ considered the nature of the TVCatchup service in light of EU and UK law. Specifically, the *Copyright, Designs and Patents Act 1988* (UK) (the **UK Copyright Act**) and recital 23 in the preamble to Directive 2001/29 of the European Parliament and of the Council (the **EU Directive**):

This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.<sup>3</sup>

1 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 at paragraph 67.

2 Optus submission to the Copyright and Digital Economy Issues Paper, Australian Law Reform Commission, November 2012, [http://www.alrc.gov.au/sites/default/files/subs/183\\_org\\_optus.pdf](http://www.alrc.gov.au/sites/default/files/subs/183_org_optus.pdf).

3 *ITV Broadcasting and ors v TVCatchup Ltd* (2013) *European Court of Justice* C-607/11, para 3.

The High Court of Justice found that while copyright subsists in a television broadcast, it was unclear whether the right of communication to the public was breached in a case where a person would otherwise lawfully be able to view the broadcast and the effect of the one-to-one nature of TVCatchup's service on existing law. In light of this uncertainty, the HCJ referred the matter to the Court of Justice of the European Union (the **CJEU**)

Not unlike Optus' TVNow service, TVCatchup relied on their technical architecture to the extent that they claimed they were not communicating to the public a broadcast in which the copyright was owned by the broadcaster. The CJEU ultimately found that, despite their system design, TVCatchup was communicating the broadcast to the public in breach of the broadcaster's exclusive rights.

In their defence, TVCatchup relied on two distinct points: one for the broadcast of public service channels and one for the broadcast of digital channels. In respect of the public service channels, TVCatchup suc-

### **the CJEU focused more closely on the service as a whole (and not the individual transmissions) in finding that the service was communication to the public**

cessfully argued that re-transmission of Channel 3, Channel 4 and ITV was a cable service under s73 of the UK Copyright Act which allows cable operators to re-transmit those channels without a licence. In respect of the digital channels, TVCatchup contended that their service 'is merely a technical means to ensure or improve reception of the terrestrial television broadcast in its catchment area.'<sup>4</sup> The CJEU acknowledged that a technical intervention that was restricted only to the improvement of reception was not a communication within the meaning of the EU Directive.<sup>5</sup> Ultimately, the CJEU rejected this defence in stating that:

the intervention of such a technical means must be limited to maintaining or improving the quality of the reception of a pre-existing transmission and cannot be used for any other transmission.<sup>6</sup>

The technical architecture of the service was designed in order to avoid a communication to the public at large by implementing a one-to-one transmission mode. However, the CJEU focused more closely on the service as a whole (and not the individual transmissions) in finding that the service was communication to the public. In doing so, they highlighted the general nature of the term 'public':

In the second place, in order to be categorised as a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a 'public'. In that connection, it follows from the case-law of the Court that the term 'public' in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. As regards that last criterion specifically, the cumulative effect of making the works available to potential recipients should be taken into account. **In that connection, it is in particular relevant to ascertain the number of persons who have access to the same work at the same time and successively. In that context, it is irrelevant whether the potential recipients access the communicated works through a one-to-**

**one connection. That technique does not prevent a large number of persons having access to the same work at the same time.**<sup>7</sup>

The CJEU decision is an interpretation of EU law as requested by the HCJ. The answers will now inform the HCJ in reaching its final decision. However, as the HCJ did not refer the question of whether TVCatchup's operations fell within the s73 re-transmission exception of the UK Copyright Act, it appears that TVCatchup will be free to continue to re-transmit those channels to its subscribers despite the CJEU ruling.

### **Aereo**

Aereo extends the TVCatchup and Optus technical model further by allocating each subscriber their own individual antenna. Aereo operates out of a warehouse in Brooklyn, New York where they house thousands of small antennas with a diameter of a few centimetres. Each Aereo subscriber rents an individual antenna that receives free to air television which is streamed live to the subscriber from an individual PVR. Aereo has maintained that the nature of the legal relationship with its subscribers is in the form of a licence to use the antenna and DVR services and not the underlying content. In practical terms, the Aereo model operates as a regular television except with a very long cable between the antenna that receives the broadcast and the screen that displays the content.

Aereo streams broadcast television captured by its antennas which means only local content is included. Aereo restricts its subscribers to those with a New York address but has recently announced plans to expand to New Jersey, Connecticut and Pennsylvania. Earlier this year, after the completion of a US\$38m funding round, Aereo announced that it would later expand its service to 22 more cities including Miami, Boston, Washington DC and Salt Lake City.

In July 2012, several networks including Fox, NBC and PBS sought an injunction from the United States District Court for the Southern District of New York to stop Aereo from streaming broadcasts to its subscribers. Nathan J denied the application of the broadcasters who then appealed the decision to the Second Circuit Court of Appeal. In April 2013, the Second Circuit affirmed the decision of Judge Alison Nathan in a 2-1 decision (Judge Denny Chin dissenting) thereby allowing Aereo to continue operation. The Second Circuit Court of Appeal relied on an earlier 2008 decision involving subscription television provider Cablevision<sup>8</sup> where public broadcast was considered by the Court. In following the precedent, the Second Circuit has further entrenched Aereo's legal foundation to work within the bounds of the US Copyright Act within the geographic boundaries of the Second Circuit.

Judge Christopher Droney's comments below highlight the importance of Aereo's multiple antenna model:

It is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna, ensuring that the potential audience of that transmission is only one person. Plaintiffs have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet: it remains the case that only one person can receive that antenna's transmissions.<sup>9</sup>

A competitor to Aereo, aptly named AereoKiller, has been the subject of a similar claim by television broadcasters. However, the application

4 Ibid 27.

5 see to that effect, *Football Association Premier League and Others v QC Leisure and Others (C-403/08)* paragraph 194 and *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09)* paragraphs 74 and 79.

6 *ITV Broadcasting and ors v TVCatchup Ltd (2013) European Court of Justice C-607/11*, para 29.

7 Ibid 31.

8 *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2<sup>nd</sup> Cir. 2008).



has been made in the Ninth Circuit of California where the court was not bound by the Second Circuit ruling in respect of Aereo. Judge George Wu, in awarding the injunction, stated that:

Second Circuit law has not been adopted in the Ninth Circuit, and this Court would find that the Ninth Circuit's precedents do not support adopting the Second Circuit's position on the issue. Instead, the Court would find that Defendants' transmissions are public performances, and therefore infringe Plaintiffs' exclusive right of public performance.<sup>10</sup>

Aereo has publically stated they are using a 'phased' approach to expansion so the Ninth Circuit ruling may not affect their expansion plans yet. However, a negative ruling in the Ninth Circuit could restrict revenue opportunities for any live streaming entity given the large territory of that jurisdiction.

In April 2013, Fox and CBS have publically stated that they would consider withdrawing their broadcast from public airways and switch to a subscription only model.<sup>11</sup> It appears that the broadcasters would be wary of subscription television providers, who currently pay large fees for retransmission rights, implanting a similar technical model to Aereo in order to retransmit for free the content they previously were paying for.

In May 2013, the CEO of Time Warner Cable, Glenn Britt, told the Washington Post that: "what Aereo is doing to bring broadcast signals to its customers is interesting" and "if it is found legal, we could conceivably use similar technology."<sup>12</sup> Also in May 2013, ABC and Time Warner announced that they would be making their broadcasts available on mobile devices free-of-charge to individuals that already subscribe to a pay television service. This appears to serve two ends: first, it provides a competitive service to Aereo and for free (provided the user is a subscriber to a pay television service already) and second: it aims to familiarise end users with mobile streaming of free-to-air television ahead of any attempt by pay television operators to offering the same free-to-air television broadcast content via an 'Aereo-type' model.

## Conclusion

In reviewing the judgments of the various courts around the world, the key point of difference lies in their interpretation of what it means to communicate to the public. The CJEU found that the architecture of the TVCatchup service was largely immaterial and noted that:

it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.<sup>13</sup>

Conversely, the US Second Circuit Court of Appeals found that despite many people having access to the same transmission at the same time, "it remains the case that only one person can receive that antenna's transmissions."<sup>14</sup> While the Full Federal Court of Australia didn't directly opine on whether TVNow constituted a communication to the public, the decision at first instance appears to align more closely with Aereo than TVCatchup.

It is clear that the courts are limited in their power to provide a solution to this problem. The problem, in this author's opinion, is that the justification used by the courts to allow or restrict live streaming is based upon legislation that did not contemplate providing television over a delivery mechanism that differs from traditional broadcasting. In each case, the solution lies with legislative change to give certainty to all interested parties. As the High Court drew out in *Australian Education Union v Department of Education and Children's Services*, a court must not adopt:

a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.<sup>15</sup>

## the justification used by the courts to allow or restrict live streaming is based upon legislation that did not contemplate providing television over a delivery mechanism that differs from traditional broadcasting

The spread of information, culture and entertainment, in whatever form, should not rest upon such a fragmented and fragile foundation. There remains some hope that the ALRC's report on the inquiry into Copyright and the Digital Economy, due to be released in November 2013, will guide the legislature in solving these problems.

***Matthew Tracey is a lawyer in the Technology, Media and Telecommunications group at Allens.***

***The views expressed in this article are the views of the author only and do not represent the views of any organisation.***

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9 WNET, *Thirteen v. Aereo, Inc.; Am. Broad. Cos., Inc. v. Aereo, Inc.* (2<sup>nd</sup> Cir. 2013) 12-2786 p29.

10 NBC Universal Media, LLC, et al. v. Barry Driller, Inc., et al. (9<sup>th</sup> Cir. 2012) 12-6950 p3.

11 New York Times, *Aereo has TV Networks Circling the Wagons*, 10 April 2013.

12 The Washington Post, *Time Warner Cable CEO wants to slim cable bundles, eyes Aereo's technology*, 3 May 2013.

13 *ITV Broadcasting and ors v TVCatchup Ltd* (2013) European Court of Justice C-607/11, para 31.

14 WNET, *Thirteen v. Aereo, Inc.; Am. Broad. Cos., Inc. v. Aereo, Inc.* (2<sup>nd</sup> Cir. 2013) 12-2786 p29.

15 *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [28].

## Upcoming Copyright Seminar

The Australian Law Reform Commission is expected to release the Discussion Paper in relation to its "Copyright and the Digital Economy" inquiry by the end of May.

CAMLA and the Copyright Society will be jointly hosting a panel discussion and audience Q&A regarding the issues arising from the Discussion Paper in late June 2013.

Our panellists will discuss the potential impact of the ALRC's recommendations across a number of industry sectors and give a flavour of how industry players are grappling with the issues under review.

CAMLA and the Copyright Society hope that you will be able to join us at Gilbert + Tobin to compare notes on the recommendations.

CAMLA members will be sent further details on this event in the coming weeks or keep in touch via the CAMLA website or CAMLA's LinkedIn page.

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## Contributions & Comments

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

Contributions in hard copy and electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at [editor@camla.org.au](mailto:editor@camla.org.au) or to

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## Communications & Media Law Association Incorporated

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

Issues of interest to CAMLA members include:

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

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

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

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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The Communications Law Bulletin is the journal of the Communications and Media Law Association (**CAMLA**) which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

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