

Mobile TV - The Hype and the Reality

Nick Abrahams and Glenda Stubbs look at legal and commercial issues raised by Mobile TV in Australia and internationally.

Introduction

Will Mobile TV be the "killer content application in 2006" as predicted by one of IDC Australia's analysts?¹ As the range of mobile content continues to expand and technology standards are now capable of delivering quality audio and video, the prediction has some merit especially given there are over two billion mobile phone users around the world.

This article will briefly examine the development of Mobile TV as well as identifying issues likely to be faced by regulators and content suppliers.

Background

The first Mobile TV service was launched in Korea in May 2005. That service now has 44,000 subscribers². Earlier this year Japan launched its first Mobile TV service. Mobile handsets available in Japan now not only provide access to the internet, the handsets also work as electronic program guides and TV remote controls.

Elsewhere in the world countries are running Mobile TV trials. In France the mobile telecommunications operator SFR undertook a 6 month trial testing of DVB-H mobile TV technology. The trial involved 500 users watching 14 TV channels on Nokia's 7710 DVB-H handsets. The content available during that trial was mostly live sports and news content.

Other countries trialling Mobile TV include United States, Britain, Sweden, Finland and Australia.

The following trials have already taken place in Australia:

- in July 2005 Bridge Networks and Telstra began a 12 month trial. The trial

content includes Foxtel channels, Nine Network Service, ABC2, SBS, CNNi and Sky Channel racing;

- during the Commonwealth Games Microsoft, Telstra and Broadcast Australia set up PDAs with access to 7 different programmes of Channel Nine's coverage of the Games; and;
- in Sydney earlier this year Broadcast Australia allowed about 1000 viewers to watch 15 TV channels on Nokia mobiles.

User feed back of those trials noted:

- transmission delays when receiving TV content via a mobile phone where the same content is being simultaneously delivered to television sets. This occurred during the Commonwealth Games Trial; and
- the enjoyment of being able to view live news and sports items at a time when users would otherwise be unable to view them.

How is Mobile TV technically possible?

Mobile phones can be fitted with a chip to pick up digital TV signals using a digital mobile TV standard. The trials in Australia are using the DVB-H standard. DVB-H is one of four competing digital mobile TV standards around the world. The DVB-H standard was formalised in August 2004 and allows simultaneous transmission of television, radio, audio and internet content to mobile devices including PCs. DVB-H technology differs from current 3G-type services in that the content is broadcast like free to air television rather than being streamed as a download through the mobile phone

Volume 25 N° 1
September 2006

Inside This Issue

Mobile TV -
The Hype and the Reality

Do Not Call Register:
Telemarketers Beware

Google In China

Copyright Law Reform

Digital Content Distribution in the
Asia Pacific Region

The Communications and Media Law Association is looking for a new co-editor for the Communications Law Bulletin for 2007. Please send expressions of interest and professional resumes to Page Henty at email; phenty@austar.com.au before 15 November 2006. We look forward to hearing from anyone who is interested.

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Contents

Mobile TV - The Hype and the Reality

Nick Abrahams and Glenda Stubbs look at legal and commercial issues raised by Mobile TV in Australia and internationally.

Do Not Call Register: Telemarketers Beware

Matthew McMillan analyses the Federal Government's new legislation on the establishment of a national Do Not Call Register and minimum contact standards for the telemarketing industry.

Google In China

Google has been having trouble in China. Luke Bentzelzen and Yong Lee look at the internet in China, what's happening to Google, Google's response and the debate that's followed.

Copyright Law Reform

Annika Forss and Peter Chalk summarise the Federal Government's proposed changes to the *Copyright Act 1968* (Cth) allowing for new uses of copyright material and strengthening enforcement in the digital age.

Digital Content Distribution in the Asia Pacific Region

Nick Abrahams and Trent Lyndon look at the issues confronted by US content vendors entering into new markets in Asia Pacific countries

network. There is no limit to the number of devices that can receive such a transmission.

Revenue Models

It is not yet clear how revenue models are likely to operate with regards to Mobile TV. For example who will own the advertising rights and to what extent will forecasted usage play a part? By comparing the trials in Europe with the Mobile TV service operating in Korea, Mobile TV usage varies region by region. For instance UK usage tended to spike at lunchtime, whereas French usage peaked in early morning and in early evening. In Korea usage spiked during the morning peak hour. Certainly there is evidence to show mobile content is a revenue earner. Earlier this year the Vice President of NTT DoCoMo reported mobile content revenue being in the vicinity of \$7.22 billion³.

As a sign that mobile content is seen as an important dollar earner, television media rights have recently been offered in separate packages to split TV and radio broadcasting rights from rights relating to content that can be supplied via the internet or available on mobile telephony. For instance, Infront Media (exclusive marketing agency for the distribution of FIFA's broadcast rights) marketed the internet and mobile tv rights to the 2006 FIFA World Cup separately from the television and broadcast rights. In 2002 Infront allowed the first trial transmissions to mobile phones of the 2002 FIFA World Cup to one territory, Japan. Whereas for

the 2006 FIFA World Cup Infront negotiated media licenses with over 40 mobile operators and mobile content providers throughout the world, including Hutchison Telecommunications Group

Regulatory Issues

So far there is little guidance from Japan and Korea as to what regulatory issues are raised by Mobile TV. In Japan programming for Mobile TV is no different from ordinary TV shows available on television sets. There will be no special programming to cater to mobile devices until 2008.

In March 2006 the Australian Communications and Media Authority released a discussion paper⁴ calling for comment on the possible use of two 7 MHz television channels that remain unassigned after planning for digital television. The discussion paper raised the possibility of using that spare spectrum for Mobile TV services.

Over 30 submissions were received from a wide range of parties including broadcasters, telecommunications companies and content providers. Some of the regulatory issues flagged in the paper and submissions in regards to the use of the spectrum for Mobile TV services included the need to ensure that:

- mobile TV to be subject to the same end to end planning processes as other services operated in the Broadcasting Services Bands;

- consumers enjoy a Mobile TV experience and service consistent with existing expectations of TV broadcasting;
- services in adjacent bands are protected from interference;
- Mobile TV content include minimum levels of Australian content;
- Mobile TV suppliers hold broadcasting licences;
- content standards apply to content supplied via Mobile TV;
- free-to-air broadcasting rights currently enjoyed by free-to-air broadcasters are protected; and
- retransmission rights are obtained.

On 13 July 2006 the Minister for Communications, Information Technology and the Arts announced a comprehensive media reform package. As part of that package Senator Coonan announced the intention to redesign the datacasting spectrum so as to open up two reserved digital channels for new digital services such as mobile television. The Senator expects to announce later this year as to how the package will be implemented including what conditions might be imposed on those new digital licences.

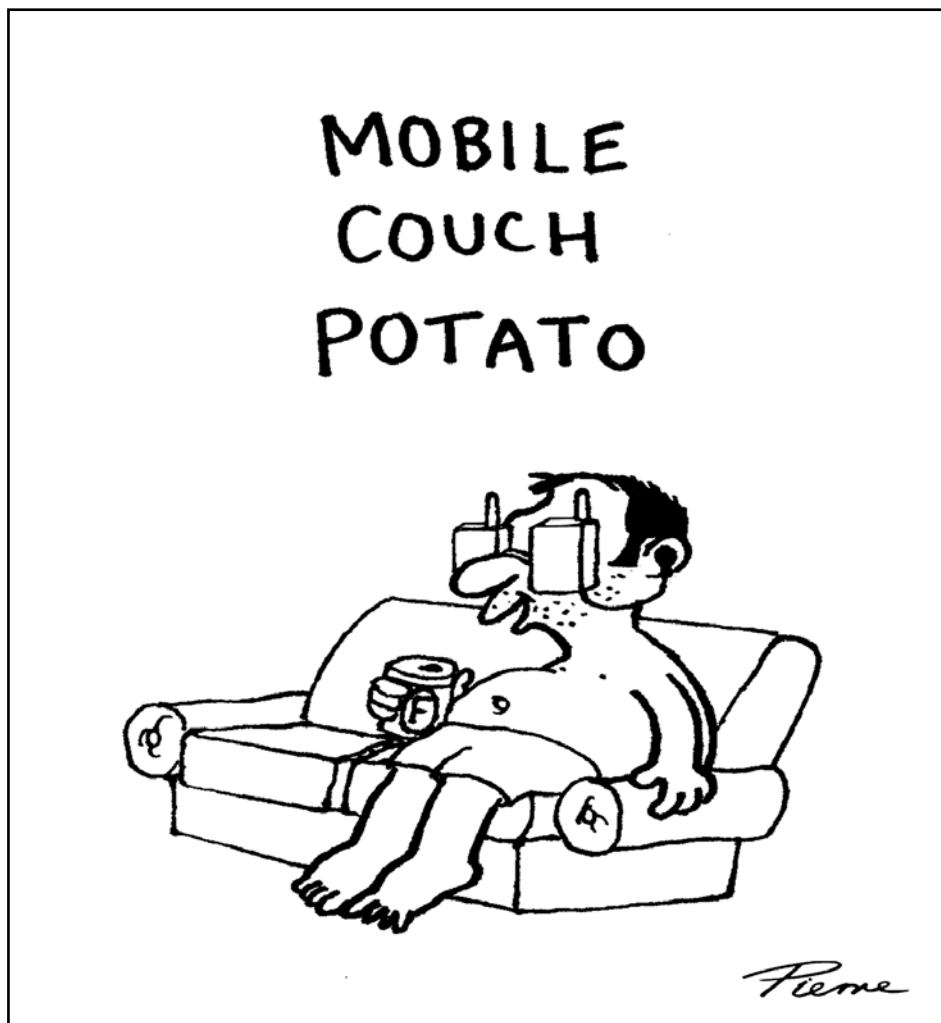
During the press conference a concern was raised that mobile phone companies might try to acquire exclusive deals on content. In response Senator Coonan referred to recent

speeches by the competition regulator who has said the ACCC are interested in ensuring that mobile phone companies do not wrap up exclusive deals on content.

As the authors noted in their Communications Law Bulletin article earlier this year examining the regulatory issues surrounding IPTV⁵, the demarcation between content accessible via traditional means and through new technology is diminishing. Consequently traditional models of content regulation are constantly being challenged. Mobile TV is certainly inevitable. As to whether Mobile TV content suppliers will be required to comply with the same regulatory obligations as the free-to-air broadcasters, will no doubt be a hot topic in the lead up to any spectrum auction.

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1. "Mobile Model Mania", Jennifer Dudley, The Courier Mail, 5 April 2006.
2. "Its an on-off start for TV on the move", Agence French Presse, 9 April 2006.
3. "Mobile TV is on the Move", Brian Buchanan, The Australian, 18 April 2006.
4. The discussion paper related to "Future use of unassigned television channels"
5. "Legal Issues Arising from IPTV", Communications Law Bulletin, December 2005.



Do Not Call Register: Telemarketers Beware

Matthew McMillan analyses the Federal Government's new legislation on the establishment of a national Do Not Call Register and minimum contact standards for the telemarketing industry.

Introduction

On 30 June 2006, the *Do Not Call Register Act 2006* and *Do Not Call Register (Consequential Amendments) Act 2006* (the **Acts**) received Royal Assent. The Acts will see the establishment and maintenance of a national Do Not Call Register (**Register**) under which telemarketers will be prohibited from contacting telephone numbers listed on the Register, subject to certain exemptions.

The Acts follow the announcement by the Minister for Communications, Information Technology and the Arts, Senator the Hon Helen Coonan, on 4 April 2006, that

Australia would see the introduction of a do not call register as a means to address intrusive telemarketing practices. The announcement, in turn, follows a discussion paper released by the government in October 2005 considering an Australian model in light of already existing international models in the United Kingdom and United States¹.

The Government has pledged \$33.1 million over the next 4 years for the establishment and maintenance of the Register².

The legislation comes as a relief to consumers who are subject to an estimated 1 billion telemarketing calls a year – an average

of almost 3 per week for each Australian household³. The government is predicting at least 1 million registrations in the first week of the Register's operation and 4 million in its first year⁴.

Such predictions have caused angst amongst the 250,000-person strong telemarketing industry in Australia, with concerns raised that the reforms will stifle legitimate direct marketing business practices, result in regional call centres closing down (bringing about higher unemployment in areas where unemployment is already high) and leave telemarketing companies with little choice but to relocate to low-cost offshore locations such as India⁵.

This article reviews the new legislation and what it means for telemarketers, with emphasis on the key areas of contention within the industry.

Goodbye to Self-Regulation

The introduction of the Register will mark the end of self-regulation by the telemarketing industry in Australia. To date, the telemarketing industry has sought to manage direct marketing practices through industry codes, such as the Australian Direct Marketing Association's (ADMA) Direct Marketing Code of Practice⁶. The ADMA also runs its

own "do not contact" service, incorporating "do not mail" and "do not call" registers.

The problem with the Code and the registers is that they do not apply across the whole telemarketing industry, only to companies which are ADMA members. In recognition of this limitation, the ADMA itself has welcomed a national legislative initiative which will address inconsistencies within the industry and create a unified approach to direct marketing in Australia⁷.

Time to Legislate

The tables below summarise the key provisions of the Acts, including:

- the nature of the Register and how it will operate;
- the exemptions; and
- the minimum national contact standards.

Do Not Call Register Act⁸	
What does it do?	It establishes a single national Register which will allow individuals to register not to receive "telemarketing calls" on their land lines or mobile phones.
What constitutes a "telemarketing call" (section 5)	<p>A "telemarketing call" is a voice call to a telephone number where the purpose (or one of the purposes) of the call is:</p> <ul style="list-style-type: none"> • to offer to supply: (i) goods or services; or (ii) land or an interest in land; • to offer to provide a business opportunity or investment opportunity; • to advertise or promote: (i) goods or services; (ii) land or an interest in land; or (iii) a business opportunity or investment opportunity; • to advertise or promote a supplier (or prospective supplier) of: (i) goods and services; or (ii) land or an interest in land; • to advertise or promote a provider (or prospective provider) of a business opportunity or investment opportunity; • to solicit donations; or • for another purpose specified in the regulations.
Prohibition on telemarketing calls (section 11(1))	Generally speaking, telemarketers will not be allowed to make (or cause to be made) telemarketing calls to individuals whose numbers are registered on the Register <i>unless</i> the call is a "designated telemarketing call".
What is a "designated telemarketing call" (schedule 1)	<p>A "designated telemarketing call" is a telemarketing call which is authorised by:</p> <ul style="list-style-type: none"> • a government body, religious organisation or charity; • a registered political party, a member of parliament or a government body, or a political candidate where the purpose (or one of the purposes) of the call is to conduct fund-raising for electoral or political purposes; or • an educational institution where the call is made to a current or previous student's household or workplace. <p>In each case, the call must relate to goods or services and must not be of a kind specified in the regulations.</p>
What exceptions apply? (sections 11(2), (3), (4) and (5))	<p>The prohibition on making telemarketing calls does not apply if:</p> <ul style="list-style-type: none"> • the individual (or its nominee) consents to the making of the call; • the telemarketer has accessed the Register and has received information in the 30 day period prior to the making of the call that the number was not listed on the Register; • the telemarketer has made (or caused to be made) the call by mistake; or • the telemarketer has taken reasonable precautions, and exercised due diligence, to avoid the contravention. <p>The telemarketer will bear the evidential burden if it wishes to rely on any of the above exceptions.</p>

Who will administer the Register? (section 13)	The Australian Communications and Media Authority (ACMA) will be responsible for either directly administering the Register or appointing an appropriate body to administer the Register.
What numbers can be registered? (section 14)	Registration will be open to telephone numbers which are: <ul style="list-style-type: none"> • Australian; • used or maintained exclusively or primarily for private or domestic purposes; and • not used or maintained exclusively for transmitting or receiving faxes.
Who can register? (section 15)	Applications for registration can be made by the telephone account-holder or a nominee. This requires the telephone account-holder or nominee to take active steps to “opt out” in order to be recorded on the Register.
No registration fees	Subscribers will pay no fee to list their numbers on the Register.
How long will the registration last? (section 17)	The registration of a telephone number will remain in force for 3 years (after which it can be re-registered).
How can the Register be accessed? (section 19)	A telemarketer who wishes to access the Register may submit a list of telephone numbers to the ACMA (or its contracted service provider). The telemarketer will have to pay a fee. The ACMA (or its contracted service provider) must then check the numbers on the telemarketer’s list against the numbers recorded on the Register and inform the telemarketer of those numbers which are (or are not) listed on the Register.
What are the penalties?	Telemarketers that contact persons listed on the Register are subject to a range of enforcement options including formal warnings, civil penalties and injunctions. Fines range from \$1,100 to \$1.1 million.
Do Not Call (Consequential Amendments) Act 2006⁹	
What does it do?	It amends the <i>Telecommunications Act 1997</i> and the <i>Australian Communications and Media Authority Act 2005</i> to enable the ACMA to develop standards and industry codes for the operation of the telemarketing industry.
ACMA to determine minimum contact standards (section 36)	The ACMA must determine a standard for the telemarketing industry dealing with the following matters: <ul style="list-style-type: none"> • restricting the hours and days during which telemarketing calls may be made; • requiring the disclosure of certain basic information when making telemarketing calls (such as the name and address of the organisation calling or the organisation on whose behalf the call is being made); • a requirement to terminate the call immediately upon a specified event (eg at the request of the person being called); and • requiring the telemarketer to ensure that calling line identification is enabled.

The "Opt Out" Approach

In order to "opt out" of receiving telemarketing calls, an individual must make an application to the ACMA (or its contracted service provider) in accordance with section 15 of the legislation.

Interestingly, the "opt out" approach contrasts with the approach taken by the government under the *Spam Act 2003 (Spam Act)*. The Spam Act prohibits the sending of unsolicited commercial electronic messages unless the recipient's consent (either express or inferred) has been obtained. At the time the Spam Act was introduced, it was considered that this "opt in" approach was necessary in light of the exponential growth in spam and the threat it posed on an international scale.

In the Government's view, telemarketing does not pose the same type of threat. To subject the telemarketing industry to a restrictive "opt in" approach would have dire consequences for the industry and negate the fact that telemarketing still has a legitimate role to play in the Australian economy, providing consumers with easy access to the marketplace for goods and services¹⁰. An "opt out" model, on the other hand, allows consumers to express their preference not to be contacted. Indeed, this is an approach which has been favoured by both the United Kingdom and the United States.

That being said, the adoption of an "opt out" approach has still been met with criticism from within the telemarketing industry.

Compliance Costs

The financial penalties for contravening the legislation are significant, with fines ranging from \$1,100 to \$1.1 million. This means that it will be prudent for telemarketers to maintain up-to-date lists of the individuals which they are prohibited from contacting. Opt out lists will not be provided by the ACMA. Rather, telemarketers will be required to pay an annual subscription fee in order to access the Register and require the ACMA (or its contracted service provider) to check the numbers on the telemarketer's list against the numbers recorded on the Register.

Section 21 of the legislation enables the ACMA to set the amount of any fee for accessing the Register. In this way, the government expects to recover \$15.9 million of the \$33.1 million establishment costs over the first 4 years¹¹. Provision is also

made for the ACMA to provide exemptions from the fees.

Whilst the access fee regime is still to be finalised, it has been suggested by one source that the fees will be somewhere between \$3,000 and \$8,000 per annum¹², with the larger telemarketing companies expected to pay towards the higher end¹³.

The extent to which industry will be able to fund these costs has been questioned by the ADMA. In particular, the view has been expressed that the costs are prohibitive for smaller telemarketing companies¹⁴.

Offshore Telemarketers

Concern has also been raised that, whilst the Register will significantly affect the Australian telemarketing industry, it will do little to curtail the increasing number of calls being received from offshore locations¹⁵.

The government has sought to address this by giving the legislation extraterritorial application. Part 2 of the legislation is wide enough to capture persons calling from overseas locations - the test simply being whether or not a call has been made to an "Australian number" - whilst section 9 specifically confirms the intention of the legislation to apply "to acts, omissions, matters and things outside of Australia".

Section 12 is also useful in this regard. It puts a positive obligation on persons entering into telemarketing contracts to include a requirement obliging the telemarketer to comply with the legislation. In particular, section 12(1) prohibits a person from entering into a contract, arrangement or understanding if:

- the agreement relates to the making of telemarketing calls to numbers eligible to be registered on the Register; and
- the agreement does not contain an express provision to the effect that the person will comply with the legislation and take all reasonable steps to ensure that its employees and agents will comply with the legislation, in relation to the making of telemarketing calls.

An organisation cannot, therefore, attempt to escape the reach of the legislation by simply outsourcing its telemarketing activities to offshore locations such as India or the Philippines.

The practicalities of enforcing Australian law in offshore jurisdictions, however, continue to pose difficulties and the legislation offers only a partial solution to the problem. This is particularly so in respect of telemarketers that do not have a physical presence in Australia. In such circumstances, prosecution would involve Federal Court proceedings which would require enforcement by overseas jurisdictions. The Government has acknowledged that the problem of "rogue" offshore telemarketing remains an issue which requires further investigation¹⁶.

Small Businesses

In its discussion paper of October 2005, the Government proposed giving small businesses (in addition to individuals) the opportunity to "opt out" of receiving direct marketing calls. The Government defined a "small business" as a business employing 20 or less people, in line with the definition used by the Australian Bureau of Statistics¹⁷.

Although intended to address the concerns raised by the small business community, the Government's proposal met with much criticism from the ADMA which considered that business-to-business marketing would be jeopardised if small businesses were allowed to register¹⁸.

Following further consultation with industry, the Government has decided to exclude small businesses from being able to register.

Social Research Exemption

Another area of contention within the industry was the proposed exemption regarding "market researchers undertaking social research". This exemption was first raised in the Government's discussion paper of October 2005. The rationale behind this exemption was that social research provides valuable information which helps to drive policy decisions.

The intended breadth of this exemption, however, caused much confusion with advocates from the Association of Market and Social Research Organisations and the Australian Market and Social Research Society voicing concerns that the exemption did not factor in legitimate market research. The argument being put forward was that the public does not generally differentiate between social and market research and, provided such research is not linked to selling activities, there should be no need to differentiate the two¹⁹.

Again, this is an area where the Government appears to have taken heed. It has been careful to define "telemarketing calls" by reference to selling activities in section 5. This means that an organisation making a call solely for research purposes will not fall foul of the legislation.

Conclusion

Needless to say, the regime established by the new legislation is not going to suit everyone. The Acts are the government's attempt at a model that balances, as best it can, the rights of individuals to be free of nuisance calls with the rights of businesses to access the community for legitimate purposes²⁰. It is expected that the Register will be up and running in 2007.

Matthew McMillan is a Senior Associate at Henry Davis York in Sydney.

1. Department of Communications, Information Technology and the Arts, Introduction of a Do Not Call Register: Possible Australian Model, Discussion Paper (October 2005). The paper draws on recommendations relating to telemarketing arising from the Office of the Federal Privacy Commissioner, Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988, and the Senate Legal and Constitutional References Committee, The Real Big Brother: Inquiry into the Privacy Act 1988.

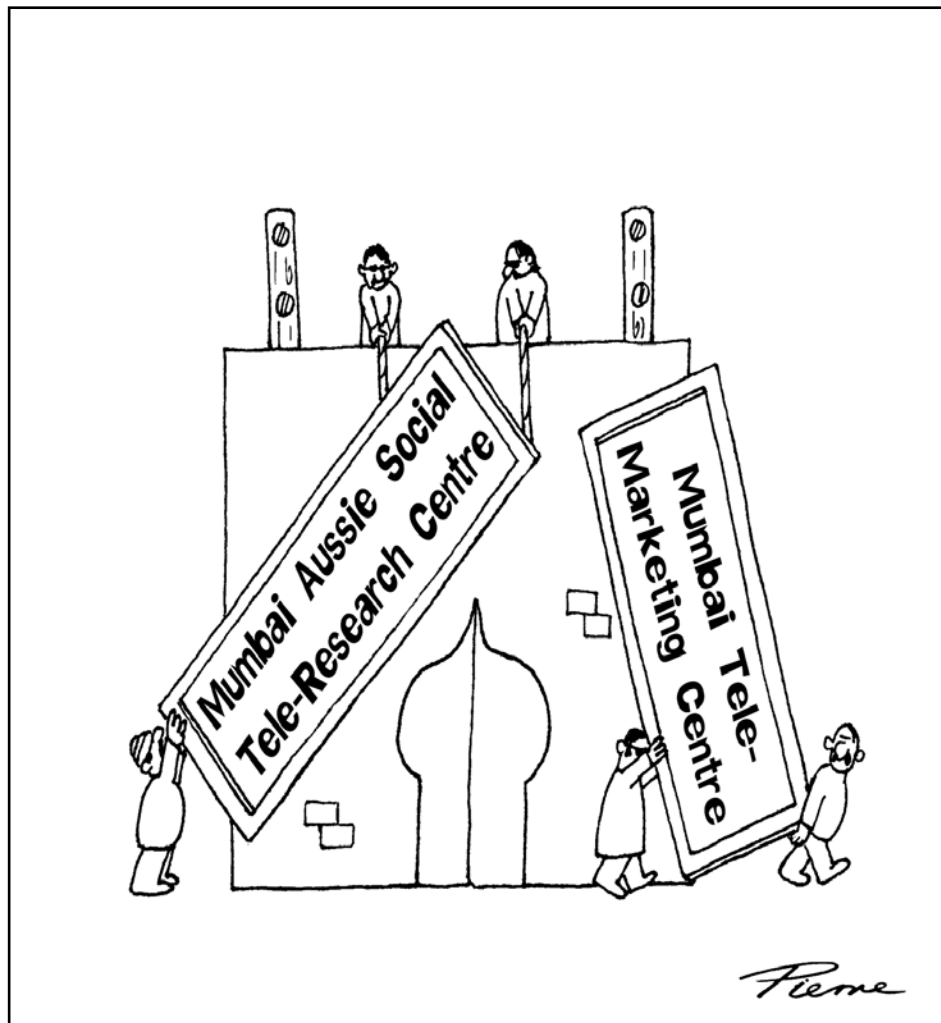
2. Budget Paper No.2, Part 2: Expense Measures, Communications, Information Technology and the Arts at http://www.budget.gov.au/2006-07/bp2/html/bp2_expense-03.htm. Expenses for this measure will be partially recovered by ACMA from industry to a total of \$15.9 million over 4 years.

3. The Sydney Morning Herald, 'Throw out the baby with the bathwater, and every other excuse', 5 April 2006. In October 2005, information research company CEASA (Commercial Economic Advisory Service of Australia) estimated that telemarketing companies were responsible for 1.065 billion calls in Australia in 2004, an average of 53 calls per person or 2.7 per household per week.

4. ABC News Online, 'Government plans 'Do Not Call' register', 4 April 2006 at <http://www.abc.net.au/news/newsitems/200604/s1607923.htm>.

5. The Age, 'Telemarketers disturbed by 'do not call' plan', 15 April 2006 at <http://www.theage.com.au/news/business/telemarketers-disturbed-by-do-not-call-plan.htm>.

6. ADMA, Direct Marketing Code of Practice, November 2001. This code was authorised under section 88(1) of the Trade Practices Act 1974 by the ACCC. It is based on the



provisions of the Model Code released by the MCCA in 1997.

7. The Age, above note 5.

8. This table is based on the Do Not Call Register Act 2006.

9. This table is based on the Do Not Call Register (Consequential Amendments) Act 2006.

10. Department of Communications, Information Technology and the Arts, above note 8, pp.11-12.

11. Above note 1.

12. The Age, above note 5.

13. ABC, 'Do not call register', 6 April 2005 at <http://www.abc.net.au/goulburnmurray/stories/s1610141.htm>.

14. The Age, above note 5.

15. InfoQuorum, 'Proposed Do Not Call Register is dubious in achieving its goals', 21 April 2006 at <http://www.crm magazine.com/DesktopDefault.aspx>.

16. Department of Communications, Information Technology and the Arts, above note 8, pp.15-16.

17. Department of Communications, Information Technology and the Arts, above note 8, p.13.

18. The Age, above note 5.

19. 'Do Not Call' register announced', 12 May 2006 at <http://www.mrsa.com.au/print.cfm?i=2139&e=122>.

20. Department of Communications, Information Technology and the Arts, above note 8, pp.5-6.

Google in China

Google has been having trouble in China. Luke Bentvelzen and Yong Lee look at the internet in China, what happening to Google, Google's response and the debate that's followed

Introduction

Google has been accused of infringing civil liberties by agreeing with the Chinese government to censor search results on its new www.google.cn search engine. The decision has raised questions about Google's otherwise impeccable corporate image and provoked fierce debate in the United States over the ability of multinationals to accede to other governments' politically sensitive requests.

The state of the internet in China

Google's decision to enter the Chinese market reflects a trend of rapidly increasing internet usage in that country. According to statistics released by the China Internet Network Information Center (CNNIC), on 17 January 2006, there were approximately 111 million internet users in China at the end of 2005. In July 2004, PricewaterhouseCoopers predicted that this number would increase at the rate of about 800,000 new Chinese users per week to 260 million in 2008, when internet-related spending would reach US\$63.6 billion.

The prospects for Google in China seem very bright. Although statistics on the Chinese internet search engine market are mixed, according to market research from Keynote Systems released on 18 January 2006, Google rated as the best search engine in China. Statistics released in August 2005 by CNNIC, however, show local Chinese search engine Baidu to be the clear leader in China in terms of internet traffic. In Beijing, for example, Baidu captured approximately 51.5% market share, ahead of Google's 32.9%.

Internet regulation

China's system of regulation and censorship over the internet is both complex and pervasive¹. There are multiple layers of legal regulations, often overlapping and restating each other, that are implemented by the numerous state agencies that are each responsible in part for controlling internet access and content. The overall responsibility for the supervision of the internet however lies with the Ministry of Public Security, by virtue of State Council Order No. 147².

In 2000, the State Council issued a directive stating that internet content providers must restrict information that may "harm the dignity and interests of the state" or that foster "evil cults" or "damage . . . social stability"³. The type of content available online is controlled through the use of prescriptive and proscriptive regulations, as well as licensing, registration and monitoring requirements. Internet Content Provider (ICP) licences are required to operate a website in China and, as an industry practice, foreign internet companies often use or operate under ICP licences owned by locally-owned companies. The Chinese authorities can assert pressure on foreign internet companies to conform with local regulations by questioning the 'legality' of their operations under such licensing arrangements.

The Ministry of Information Industries' investigation, launched in February 2006, into the legality of Google's licensing arrangement with the China-based Ganji.com has been viewed by some as a political action to pressure Google to comply with censorship requirements.

Google's agreement to censor

Earlier this year Google agreed to censor at the search engine level information concerning topics including Tiananmen Square, Tibet, Taiwanese independence, cult-based searches such as searches for the Falun Gong group, information about Communist Party supremacy and, according to some researchers, many other more controversial topics such as teen pregnancy, homosexuality and dating. It launched its new censored www.google.cn site on 25 January 2006.

Prior to this arrangement, the Chinese government had still filtered Google searches but did so at the Internet Service Provider level, the process becoming known as the 'Great Firewall of China'. This filtration substantially slowed Google searches and was considered to be a reason for entering the censorship agreement. Under the new arrangement, Chinese users can still access the www.google.com site but will be redirected to the censored www.google.cn site.

Google has attempted to pacify critics by assuring them that it will inform people con-

ducting searches that web pages have been removed due to governmental orders, with a note being placed on the results screen to this effect. It has also decided not to establish its email, chat room and blogging services on servers physically located in China, due to concerns that government officials could seize personal information stored on servers located in China. Google's message to the public is that the provision of a compromised search facility is better for the dissemination of information through China than abandoning its service in the country altogether.

The response to Google's concession

There has been a significant adverse reaction to Google's actions from the internet community and many US politicians. These groups believe Google is helping to facilitate restrictions on basic civil liberties such as freedom of political communication. In doing so, it is contradicting its corporate philosophy as stated on its website, which is "Don't be evil" as well as its mission statement which is to make all possible information available to everyone who has a computer or mobile phone.

Criticism has not been limited to Google, but has also been levelled against Cisco, Microsoft and Yahoo. In an article on The Nation's Web site posted on 24 February 2006, Rebecca MacKinnon, a research fellow at Harvard Law School's Berkman Center for Internet and Society, and a former CNN Beijing bureau chief, outlined the various 'evils' committed by these foreign companies. According to the article, Cisco has acknowledged selling routers with censorship capability and surveillance technologies to Chinese agencies and Microsoft has even admitted to removing the politically-sensitive blog of a Chinese journalist from its MSN Space site and censoring words like "freedom" and "democracy" from its Chinese MSN portal site. Yahoo has not only admitted to filtering its search engines in accordance with the wishes of Chinese authorities but has also been discovered to be providing information that helped Chinese officials convict dissidents, including Li Zhi who was jailed for 8 years in December 2003 and Shi Tao who was jailed for 10 years in April 2005.

The combination of these events has prompted some US politicians to speak out against multinational companies' approaches to regulatory compliance in countries such as China. In February 2006, representatives of Google, Yahoo, Cisco Systems and Microsoft

were called for questioning at a Congressional Human Rights Caucus hearing and a session of the House of Representatives subcommittee on Global Human Rights.

US Global Online Freedom Bill 2006

Following the House of Representatives hearings, a draft Global Online Freedom Bill 2006 (the Bill) was introduced on 16 February 2006 into the House of Representatives by Republican Christopher Smith and co-sponsored by 14 other Republicans. The Bill proposed to make it unlawful for US internet companies:

- to filter search results in response to the request of "internet restricting countries", defined as China, Iran, Vietnam and other nations deemed to be overly internet-restricting;
- to locate hardware within an "internet restricting country" (and thus giving the country jurisdiction to access information stored on the hardware); and
- to turn over information about users to certain governments unless the US Justice Department approves.

The draft legislation also seeks to impose new export restrictions on the "internet restricting countries" and require any website operator with US operations to provide information to the Office of Global Internet Freedom about content deleted or blocked by internet restricting countries. Certain breaches of the proposed Act can be punished by fines of up to US\$2 million and criminal penalties of up to 5 years imprisonment.

The definition of "internet restricting countries" means that the Bill would not prohibit censorship by Western nations such as Germany, which currently requires search engines to filter Nazi-related sites, or the US, which requires search engines to block results such as Kazaa under the Digital Millennium Copyright Act 1998.

The Future

The Bill is, as at 26 July 2006, still in committee phase. The last action taken on the Bill was its referral to the House Subcommittee on Commerce, Trade and Consumer Protection on 17 March 2006. The majority of Bills never make it out of committee and the future of this Bill remains uncertain. Whilst it appears that the condemnation of Google and other US companies at the House of Representatives hearing was widespread and relatively consistent, a number of Democrats did express hesitation about supporting "knee-jerk" attempts at government intervention in this field.

The Bill itself has also been subject to criti-



cism from various groups, with controversy surrounding the requirement that US internet companies report all content deleted or blocked at the request of an "internet restricting country" and also all lists of forbidden words provided to them by an official of an "internet restricting country" to a specially created US Office of Global Internet Freedom. This raises the concern that the Chinese government would take the view that US companies are acting as informers to the US government on potentially sensitive information.

Conclusion

Time will tell what impact Google's decision will have on its corporate image and, not unimportantly for Google's shareholders, its share price. The reputation Google has built for the integrity of its search results has undoubtedly been tarnished to some degree. Google must clearly have anticipated such an effect yet decided to accede to the Chinese government requests anyway, in order to tap the massive growth potential of the China market. Eric Schmidt, Google's chief executive, announced as recently as 12 April 2006 that it expected Google's Chinese revenue growth to be "large". This demonstrates that multinationals are finding that

the opportunities China presents are simply too profitable to ignore, irrespective of the political and regulatory difficulties involved in exploiting those opportunities.

These recent events also go some way toward dispelling the theory that the internet, due to its ubiquity, can never possibly be censored. Through the ongoing efforts of the Chinese government and compliance of companies like Google, information on the internet clearly can be restricted.

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1. For a comprehensive examination of the legal regulations, see OpenNet Initiative, Internet Filtering in China in 2004-2005: A Country Study, April 14 2005, at <<http://www.opennetinitiative.net/studies/china/#1>> (accessed, 19 April 2006)
2. Regulations for the Safety Protection of Computer Information Systems, State Council Order No. 147
3. Measures on Internet Information Services, State Council Order No. 292.

Copyright Law Reform

Annika Forss and Peter Chalk summarise the Federal Government's proposed changes to the Copyright Act 1968 (Cth) allowing for new uses of copyright material and strengthening enforcement in the digital age

Introduction

On 14 May 2006, the Australian Attorney-General, Phillip Ruddock, announced the Government's proposed changes to the *Copyright Act 1968* (Cth) (**Copyright Act**) resulting from the various copyright law reviews over recent years. The proposed changes will be set out in detail in a draft exposure Bill which will be released in the near future for further comment and consultation.

This article summarises the key changes that have been proposed.

Key Proposed Changes

New Exceptions for Private Use

There will be two new exceptions to copyright infringement that relate to "private use". They are as follows:

- Time shifting – Consumers will be permitted to record television and radio programs to view or listen to them at a later time. This will not allow the recording to be retained and watched or listened to multiple times.
- Format shifting – Consumers who have purchased a legitimate copy of certain categories of copyright material (yet to be defined), will be permitted to make a copy of that material in a different format. This will allow consumers to do the following:
 - store their music collection which is currently recorded on CDs, tapes and records into the memory of an MP3 player or similar article;
 - scan an article from a newspaper they have purchased onto their computer; and
 - copy old VHS tapes onto DVDs.

This exception, at least initially, will not permit the format shifting of digital audio-visual material (eg, computer games). However, the Government intends to review this exception in two years' time and then make an assess-

ment about whether the exception should be extended to digital audio-visual materials.

New Flexible Dealings Exceptions

The Government has not proposed the inclusion of a broad "fair use" exception. Rather, it has proposed a new flexible dealing exception that will allow the following:

- non-commercial uses by libraries, museums and archives (eg, copies of parts of historical documents can be included in materials for visitors);
- non-commercial uses by educational institutions for the purpose of teaching (eg, old VHS educational tapes can be copied onto DVDs);

- non-commercial uses for the benefit of people with disabilities (eg, a person with print disabilities can copy a book into a format that they can read); and
- parody and satire.

Importantly, these exceptions will not apply where an existing exception or statutory licence would otherwise apply.

Implementation of Recommendations from the Digital Agenda Review

There are a number of minor amendments to the Copyright Act arising out of this Review. The most significant amendments will deal with allowing libraries and archives to provide better assistance to users in the online environment.

Strengthening of Copyright Enforcement

The Government has proposed a range of new measures to "tackle piracy". They include the following:



- police will be able to issue "on-the-spot" fines for acts of piracy;
- changes will be made to make it easier for copyright owners to prove copyright ownership and subsistence of copyright (eg, for films, the worldwide labelling practices of commercially-released films will be recognised);
- the Courts will be given power to award higher damages and other remedies for large scale piracy (such as that which occurs on the Internet) without the need for copyright owners to establish each individual act of copyright infringement;
- the right of a copyright owner to commence civil infringement proceedings in response to unauthorised electronic reproduction of copyright works will be confirmed;
- a broader range of offences under the Copyright Act will apply in relation to Pay TV piracy;
- research will be undertaken to identify the nature and extent of piracy and counterfeiting in Australia; and
- industry initiatives will be implemented to raise the profile of copyright enforcement issues.

Circumvention of Technological Protection Measures

The changes proposed by the Government do not, at this stage, deal with Australia's obligations under the Australia-US Free Trade Agreement in relation to circumvention of technological protection measures. This issue is still being considered by the

Government and will be dealt with under separate legislation, proposed to be released later this year.

Implications of the Proposed Changes

While the Government has proposed changes that will broaden the exceptions to copyright infringement for certain acts by certain groups, at the same time, it has proposed significant changes that will assist copyright owners in reducing and preventing piracy. Of course, the exact scope and effectiveness of the changes will not be known until the Bill implementing these changes has been released for public review and comment.

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Digital Content Distribution in the Asia Pacific Region

Nick Abrahams and Trent Lyndon look at the issues confronted by US content vendors entering into new markets in Asia Pacific countries

Introduction

Consider the hypothetical scenario of a US vendor wishing to sell music and video content over the Internet to consumers located in the Asia Pacific region. What are the high level considerations for vendors of this kind that seek new markets in the Asia Pacific, distributing products electronically over the Internet? Is there a uniform approach to regulating this type of trading activity within the Asia Pacific region, and how is this regulation enforced?

Take the cases of Australia, China, Indonesia, Malaysia and Thailand. While there is some uniformity in approach, a high level analysis of these jurisdictions demonstrates that they have varying approaches to regulation, demonstrating the need for detailed guidance and assistance by qualified counsel resident in those jurisdictions. Consider the following questions that may be asked by the US vendor in order to obtain a high level overview of the regulatory framework and to assess its ability to expand into these jurisdictions:

Prohibited content

Are there restrictions on the type of content that can be provided over the Internet?

Australia

Australia has implemented national laws that attempt to prevent the online publication of illegal and offensive content. *The Broadcasting Services Amendment (Online Services) Act 1999* (Cth) amended and inserted into the *Broadcasting Services Act 1992* (Cth), certain provisions designed to prevent the publication of illegal and offensive online content. This is achieved through the establishment of a regulatory regime that applies to Internet Service Providers and Internet Content Hosts, requiring them to block or take down offending content. This, taken together with other laws that would apply to the content providers themselves, means that there are broad based restrictions on illegal and offensive online content in Australia.

China

China has implemented laws to prevent restricted content being provided over the Internet. Restricted content includes content that opposes fundamental principles determined in the Constitution, compromises state security, harms the dignity or interests of the State, incites ethnic hatred or racial discrimination, sabotages State religious policy or propagates heretical teachings or

feudal superstitions, disseminates rumors, disturbs social orders or disrupts social stability, propagates obscenity, pornography, gambling, violence, insults or slanders a third party, infringes on the lawful rights and interests of a third party, or includes other content prohibited by laws or administrative regulations.

Indonesia

There are no laws specific to Internet content as such, but the general law would need to be complied with, which strictly prohibits, for example, the promotion of gambling, alcohol and pornography.

Malaysia

There are several restrictions that the US vendor will have to consider. These include restrictions under the Malaysian *Communications and Multimedia Act 1998* (CMA).

The US vendor may be considered a content applications service provider (CASP) within the scope of the CMA. Under the CMA, a CASP is a person who provides a content applications service such as satellite broadcasting subscription, broadcasting terrestrial free to air, television terrestrial radio broadcasting, internet content applications services, or online publishing and information services. The CMA also provides that no CASP or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy,

abuse, threaten or harass any person. The Malaysian Communications and Multimedia Commission (**MCMC**) is empowered to prosecute offenders of these regulations.

It should be noted a voluntary Content Code has also been registered with the MCMC by the Content Forum to further regulate the types of content that can be provided. By virtue of it being a voluntary Code, its objectives and principles are upheld by forum members and those who have submitted their agreement to subscribe to it. Upon finding a Content Code breach, the Complaints Bureau set up by the Content Forum is empowered to issue a written reprimand, impose a fine not exceeding fifty thousand ringgit (RM50,000) and/or require removal of the content or cessation of the offending act. Further, pursuant to the CMA, the MCMC may direct a person or class of persons to comply with the Content Code. A person who fails to comply with such a direction by the MCMC shall be liable to pay to the MCMC a fine not exceeding two hundred thousand ringgit (RM200,000).

The Films (*Censorship*) Act 1976 applies to material which comes within the definition of "film". It is an offence to exhibit a film without a valid censorship certificate. It is also an offence to publish, distribute or display publicity material about a film that has not been approved by the Board of Film Censors.

The Penal Code also provides that it is an offence to distribute, publicly exhibit or put into circulation any obscene drawing, painting, representation, or object. It is also an offence for a person to take part in or receive profits from any business in the course of which he knows or has reason to believe that obscene objects are conveyed, publicly exhibited or put into circulation, or to make or publish defamatory statements or representations with intent to harm. There are also various laws that apply to the publishing or importation of seditious or subversive materials and the communication of official secrets.

Thailand

The Ministry of Information and Communications Technology (**ICT**) and the High-Tech Center of the Thai Royal Police can, in practice, require ISPs to block access to certain sites. Typically, this occurs where a site contains content that is considered obscene or offensive to Thai public morality. The ICT is currently monitoring the web in a project called "cyberclean" to identify sites offensive to Thai values or morality. Content that would be permitted in the US is often deemed offensive by Thai authorities. Sites discussing sensitive issues in Thailand (generally described as "national

security" issues), sites that can be used for gambling, and sites having content pertaining to pornography or prostitution are often blocked.

Digital Rights Management

Are there any laws which prohibit the circumvention of digital rights management software that may be attached to content?

Australia

Australia has implemented amendments to the *Copyright Act 1968* (Cth) which regulate dealings with devices designed to circumvent technological protection measures that are used to prevent the infringement of copyright. These amendments also prohibit the unauthorised removal of electronic rights management information from works and also prohibit dealings in works which have had electronic rights management information removed without authority.

China

China has recently implemented regulations on Internet copyright protection, effective as from 1 July 2006. The *Regulations on the Protection of the Right of Communication through Information Network* prohibit people from intentionally destroying technological measures used by copyright owners to restrict others from viewing or using their works, and also prohibit people from assisting others to do the same.

Malaysia

There are no laws that deal specifically with digital rights management as such in Malaysia. However, possible grounds for preventing the circumvention of digital rights management software under general Malaysian law would include for (i) breach of contract if DRM restrictions form terms of the licensing agreement; (ii) breach of copyright law if there is unauthorised modification of the software; and (iii) breach of the *Computer Crimes Act 1997*, under which it is an offence for any person to cause any computer to perform any function with intent to secure unauthorised access to computer material (such as hacking).

Thailand

Thailand does not have laws that specifically prohibit the circumvention technological protection measures within a copyright work, but if there was a provision within the clickwrap agreement prohibiting parties from taking such action, it would theoretically be enforceable as a matter of contract, unless the provision was contrary to the Thai *Unfair Contracts Act* or *Consumer*

Protection Act (there is no precedent yet on this issue). In practice, however, it would be very difficult to enforce such a provision because of the problems associated with enforcing clickwrap agreements (discussed below) and intellectual property rights generally in Thailand.

Clickwrap agreements

Are "clickwrap agreements" enforceable in these jurisdictions?

Australia

Clickwrap and other forms of online agreements are capable of being enforced in Australia provided that the relevant terms of those agreements satisfy the general requirements for incorporation, namely that the accepting party is deemed to have accepted those terms. The *Electronic Transactions Act 1999* (Cth) also supports the enforceability of online contracts by providing that, for the purposes of a law of the Commonwealth, a transaction will not be considered to be invalid merely because it took place by way of electronic communications.

China

Agreements of this kind would be viewed as standard clauses formulated in advance for repeated use and without prior negotiations with the other party. Agreements of this kind are enforceable, subject to principles of fairness.

Indonesia

Clickwrap agreements are not enforceable in Indonesia as the rules on civil procedure prohibit the submission of electronic evidence. A new *Law on Information and Electronic Transactions* was recently proposed, but is yet to pass into law. It is anticipated that this law will deal with the enforceability of electronic transactions.

Malaysia

Such agreements are enforceable under Malaysian law provided the standard issue of having brought the terms of the contract to the attention of the consumer at the time of contract has been satisfied.

Thailand

In theory these agreements are generally considered to be enforceable, but in practice it can be difficult for the party seeking enforcement to provide adequate proof that the parties have contracted. The practical evidentiary problems associated with producing such proof are formidable in Thailand. In addition, Thai law specifically prohibits the use of clickwrap agreements for certain kinds of contracts, and the law

on this issue still evolving.

Enforceability of Californian governing law

Would a court in these jurisdictions give effect to a clause in an online contract specifying that Californian law was to govern, even though consumers were locally based?

Australia

While the parties to an online contract may agree that Californian law is deemed to govern the relationship, the enforceability of this clause, were proceedings to be validly commenced in the Australian courts, will be determined by the choice of law rules that apply to the particular area of law involved in the controversy. As an example, where the proceedings involve an action for defamation, recent uniform Australian legislation provides that the applicable law to the proceedings is to be the law of the jurisdiction with which the harm occasioned by a publication of matter has its closest connection.

China

Parties are permitted to agree that foreign law will govern a contract where one party to the contract is a foreign party. In this instance however, the US vendor would not be entitled under Chinese law to offer services directly to Chinese consumers due to restrictions on foreign participation in the Internet content market. The US vendor would be required to offer those services through a domestic Chinese company and the contract would therefore be between Chinese parties. As such, the parties would not be entitled to agree to be bound by Californian law.

Indonesia

The parties would technically be entitled to agree to Californian law as the governing law, although difficulties with the enforceability of online contracts (discussed above) remain. In practice, even were the issues with the enforceability of online contracts to be overcome, there have been instances where the Indonesian Judiciary have ignored choice of foreign law provisions and have applied Indonesian law. It is therefore not certain that an agreement to apply Californian law would be upheld by the Indonesian courts.

Malaysia

Generally, the Malaysian courts would give effect to clauses prescribing Californian law as the law of the content supply contract. Exceptions include where the choice of law is used to perpetrate fraud or avoid an ille-

gality.

Thailand

Thailand will enforce choice of law provisions unless contrary to public morals or policy (but the public policy exception is often interpreted more broadly in Thailand than in the US).

Difficulties with enforceability

Would the US vendor have any problems enforcing the agreement terms against a local consumer?

Australia

For the purposes of this question, it is initially assumed that the US vendor has been successful in obtaining judgment against the local consumer in a Californian court. The *Foreign Judgments Act 1991*(Cth) allows the enforcement of foreign judgments by registration of those judgments in the applicable Australian court. Only those jurisdictions that have reciprocal arrangements with Australia, however, are recognised under the Act. As Australia has no reciprocal arrangement with the United States, a Californian judgment would not be registerable in Australian courts pursuant to this Act, but the US vendor would still be entitled to seek to have the judgment recognized and enforced in Australia under common law principles.

If the US vendor was successful in obtaining a local judgment against the local consumer, whether through originating the initial proceedings in the local jurisdiction or having a foreign judgment enforced locally, then there are no specific additional problems that would need to be overcome by that US vendor solely by reason that the transaction was undertaken online.

China

In order to enter the Chinese market, the US vendor would need to enter into arrangements with a local Chinese agent, and provide the services through that agent. The Chinese agent would be required to obtain government approval to be permitted to distribute foreign material. As the Chinese agent will be distributing the material and entering into agreements with local consumers, it would then be open to the Chinese agent to recover payments and to enforce the agreement terms against local consumers in the ordinary course under Chinese law.

Indonesia

Foreign court judgments are not enforceable in Indonesia unless a reciprocal

enforcement treaty exists between Indonesia and the country in which the foreign judgment is handed down. No treaties of this kind are currently in force. Foreign arbitral awards are enforceable in Indonesia provided that the country in which the arbitral award was handed down is also a party to the *New York Convention on Reciprocal Enforcement of Arbitral Awards (New York Convention)*.

In practice, foreign arbitral awards are most likely to be enforceable where the agreement in question is governed by Indonesian law. Best practice would currently be to provide that customer agreements are governed by Indonesian law and that disputes be subject to arbitration in Indonesia pursuant to the Rules of the Indonesian National Arbitration Board. Where this is the case, it would be open to the US vendor to seek to directly enforce the agreement terms against local consumers in the ordinary course.

Malaysia

The US vendor may seek to enforce the agreement by way of a court action through the Malaysian courts. Alternatively, if a foreign judgment has been obtained in the US, the US vendor may, as judgment creditor, sue on the foreign judgment in Malaysia by treating the judgment as a debt due. However, in order to do so, the judgment must be a final judgment and not an interlocutory judgment; and where the claim is *in personam*, the judgment must have been for a liquidated sum. The foreign judgment will not be enforced in Malaysia if it was obtained by fraud, was obtained in breach of the principles of natural justice or is against public policy as determined under Malaysian law.

Foreign arbitral proceedings may be enforced in Malaysia if obtained from a member jurisdiction of the New York Convention. Such an arbitral award will be enforceable by Malaysian courts without going into the merits of the award.

Thailand

Thailand will not enforce foreign judgments; nor will Thailand enforce forum selection clauses (clauses providing that a dispute must be heard in a particular court.) Because Thailand will not enforce either foreign judgments or forum selection clauses, and forum selection clauses and foreign judgments (pursuant to the *Uniform Foreign Money Judgments Recognition Act*, which does not contain a reciprocity clause and has been adopted by many U.S. states) are often enforceable in the U.S., a forum selection clause can often provide an asymmetrical tactical advantage

to a Thai party (with assets only in Thailand) if a dispute arises out of an agreement containing a forum selection clause. This tactical advantage is counterintuitive and often only becomes apparent during pre-trial settlement negotiations (where most disputes are resolved) when both parties have claims (real, imagined or something in between) against each other. Foreign arbitral awards are enforceable in Thailand, subject to difficulties with the practical implementation of those awards that are discussed below.

Taxation

What would be the US vendor's tax liabilities in the particular jurisdiction?

Australia

Payments made by Australian customers for the right to download music and video content may be royalty payments, depending on the type of right / licence provided to the customer. If the payment is a royalty that is sourced in Australia, then the Australian payer will be required to withhold from the payment and remit to the Australian Taxation Office royalty withholding tax of 5%.

In certain circumstances, the supply of things other than goods and real property (eg. rights and licences) to customers in Australia may be liable to GST in Australia, if the agreement is made in Australia and/or the rights / licence is used in Australia. If this is the case, there is the ability for the overseas supplier to have the Australian customer remit the GST on its behalf provided a number of requirements, including that the recipient is registered for GST, are satisfied.

China

Technically, the revenues of a foreign vendor in China would be subject to 10% withholding tax and 5% business tax. There would, however, assuming that a US vendor could enter into online agreements directly with Chinese consumers, be significant issues with enforcing the payment of tax where the vendor is foreign and contracts are made and fulfilled online.

Malaysia

Liability for the payment of Malaysian tax by non-residents will arise only where there are deemed to be Malaysian sources of income and only where their activities constitute "trading in" Malaysia. What constitutes "trading in" Malaysia is a question of fact having regard to, amongst other things, whether there has been fulfillment of contractual obligations, deployment and use of assets and facilities and the performance of core operations of business in Malaysia. In the case of a non-resident company having

business operations outside Malaysia and selling intangible products into Malaysia through a website hosted outside Malaysia, there is unlikely to be tax payable on business income as the activities are unlikely to constitute "trading in" Malaysia. This scenario is also unlikely to give rise to there being a permanent establishment in Malaysia for double taxation treaty purposes.

If, however, payment is expected in Malaysia from a resident or business as consideration for the use or the right to use digital products or for provision of services, then withholding tax may be imposed. Under the withholding tax method, the payer is under a legal obligation to withhold tax at the appropriate rate from all payments falling within the deeming provisions made to the non-resident recipients.

Section 107A of the *Malaysian Income Tax Act (MITA)* deals with contract payments made to a non-resident contractor in respect of services under a contract. The withholding tax provision is only applicable to the service portion of the contract payments. 'Services under a contract' means the performing or rendering of any work or professional service in Malaysia, being work or professional service in connection with any contract project carried out in Malaysia. Withholding tax is only applicable to services performed in Malaysia or in connection with services performed in Malaysia. The payer is required to deduct tax at the rate of 15% of the contract payment on account of tax which is payable by the non-resident contractor for any year of assessment; and 5 % of the contract payment on account of tax which is payable by employees of the non-resident contractor for any year of assessment.

Section 109 of the MITA, which deals with interest and royalty paid to a non-resident person (including a company), provides that the rate of withholding tax is 15% in the case of interest paid to a non resident person and 10% in the case of royalty payments.

Thailand

VAT would be payable on the supply made by the US vendor and in theory would need to be paid by the Thai consumer. Where the US vendor fails to collect VAT, the Thai consumer would be obliged to withhold VAT and tax and remit the withheld funds to the Thai Revenue Department. This rarely happens in practice and VAT is usually only collected where physical items are delivered into Thailand and the product is the subject of an inspection by the Thai Customs Department, in which case customs tariffs and VAT will be levied against the goods. Where the goods are delivered electronically however, VAT is often not paid. This

can create problems for products provided to businesses if a Thai business intends to treat the money it pays for the product as a legitimate business expense. If that customer is audited, the revenue authorities may seek evidence that VAT was paid, and if the customer cannot provide such evidence, the revenue authorities will probably not only seek the payment of VAT, surcharges, and penalties for failing to pay VAT, but will also refuse to recognise the expenditure as deductible business expense.

Privacy issues

Are there any privacy obligations applicable to the US vendor when it collects personal and financial information on people resident in the particular jurisdiction?

Australia

The Privacy Act 1988 applies 10 national privacy principles to private sector organisations. These principles cover such things as collection, use and disclosure, data quality, data security, openness, access and correction, identifiers, anonymity, trans-border data flows and sensitive information. To the extent that the US vendor had a presence in Australia or was otherwise subject to Australian laws, it would need to comply with these principles in its collection and use of the personal information of persons within Australia.

China

Assuming that a Chinese agent is appointed to sell the US vendor's product in China, the Chinese agent has a legal obligation under Chinese law not to release personal information of customers to any third party unless customer approval is obtained.

Indonesia

There are no specific privacy laws currently in force in Indonesia despite the fact that there has been some discussion over the introduction of privacy laws for some years.

Malaysia

Malaysia does not currently have any privacy laws. However, a privacy law is being developed and is expected to be out by 2007.

Thailand

Thailand has proposed a draft *Data Protection Act* which is largely based on the EU model law. Section 324 of the Thai *Penal Code* also more generally prohibits the wrongful disclosure of confidential information and, in some circumstances, would be applicable to information provided over the Internet.

Alternative dispute resolution

Are alternative dispute resolution options available to be included in the agreement with local consumers?

Australia

Alternative dispute resolution is commonly used in Agreements in Australia and, subject to issues concerning the enforceability of an award or judgment as against Australian consumers discussed earlier, there would be few impediments to the use of these provisions in agreements with Australian consumers.

China

Alternate dispute resolution is an option in China, and the US vendor or its local Chinese agent may choose to utilise the services of one of the Chinese arbitration institutions. China is also developing online dispute resolution although this is still at the initial development stage.

Indonesia

As discussed above, foreign arbitral awards are enforceable in Indonesia where the country in which the award was handed down is also a party to the New York Convention, the award does not contravene national order and the District Court has provided an execution order in relation to the award. The District Court is more likely to provide an execution order where the agreement in question is governed by Indonesian law. However, following a recent case involving Pertamina, a state owned oil and gas company and Karaha, a local power producer, in which the District Court overruled the decision of a Swiss arbitration panel, the enforcement of foreign arbitral awards has become more uncertain. One alternative that has met with increased popularity since this decision is to provide for the arbitration of disputes in Indonesia pursuant to the rules of the Indonesian National Arbitration Board.

Malaysia

Arbitration is a common alternative if a foreign vendor is located in a member jurisdiction of the New York Convention. Such an arbitral award will be enforceable by Malaysian courts without going into the merits of the award.

Thailand

Thailand is a party to the New York Convention, and foreign arbitral awards are enforceable in Thailand. However, the practical implementation of such clauses can be problematic, particularly if the arbitration

clause does not address various other issues that arise under Thai law.

Local consumer protection laws

Are there local consumer protection laws that must be complied with?

Australia

There are various consumer protection laws that apply to consumer transactions in Australia, provided predominantly pursuant to Part V of the *Trade Practices Act 1974* (Cth) (TPA). The TPA operates so as to prohibit a corporation from engaging in misleading or deceptive conduct and from engaging in activity that is likely to mislead or deceive. It also operates to imply certain conditions and warranties into consumer contracts. However, if the US vendor is contracting to provide goods and services under an online contract that is governed by Californian law, the contract is deemed to have been made in the US and the US vendor is located in the US, then these provisions of the TPA will not apply as the conduct in question will not have taken place in Australia. This is because the contract will most likely be deemed to have been formed in the US and, without more, the US vendor is unlikely to be viewed as having carried on business in Australia.

China

China has laws in place relating to Internet safety and protection which include safeguarding users' personal data. Notices have also been issued by local administration of industry and commerce regarding the lawful rights and interests of consumers online. China also has in place general consumer protection legislation to protect consumers against unfair or unreasonable standard contracts and against misleading advertising. Business entities must ensure that the products provided by them have the quality, functions, uses, and date of expiry that they should have during the normal use of such products, except where the consumer is already aware of the existence of defects before the purchase such products. As the contract for the supply of the US vendor's goods and services is likely to be through a local Chinese agent, these laws would apply to the sale of those goods and services.

Indonesia

Indonesia introduced new consumer protection laws in 2000, which set out the basic rights of consumers and the obligations of business entities with respect to the sale of products and services in Indonesia. In order to comply with the law, products must have a label that sets out, amongst

other things, directions for use and the name and address of the applicable business entity. These labels must be in the Indonesian language. Business entities are prohibited from providing false or misleading information to consumers and from using certain disclaimer clauses in sale and purchase contracts. Business entities are also required to guarantee their products based upon prevailing quality standards.

In practice these laws will not impact upon the US vendor as they will be unenforceable against it in circumstances where it has no presence or assets in Indonesia.

Malaysia

The Malaysian *Consumer Protection Act* currently excludes electronic transactions from its ambit. However, the Government has recently stated this Act and other relevant laws would also be amended to ensure consumer rights are protected in e-commerce transactions.

Thailand

Thailand has implemented general consumer protection legislation in the form of an Unfair Contract Terms Act law and the Consumer Protection Act. Thailand also has specific laws regulating drugs, food, cosmetics and hazardous substances, which are potentially applicable to sites offering to sell products that are subject to regulation.

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Corporate membership \$525.00 (includes GST)
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