

## Setting Global Standards for IP Enforcement: The Anti-Counterfeiting Trade Agreement

The Anti-Counterfeiting Trade Agreement (ACTA) is a proposed plurilateral agreement on intellectual property enforcement, presently being negotiated by the United States, Japan, the European Union, Switzerland, Canada, Australia, Singapore, South Korea, New Zealand, Morocco and Mexico. ACTA may soon be concluded. The stated goal of the ACTA is “to provide a high-level international framework that strengthens the global enforcement of intellectual property rights.” In this article, Kim Weatherall discusses the background to ACTA, along with its substantive provisions, with a particular focus on those aspects that affect the online environment.\*

Intellectual property enforcement continues to be in the news. Most visible have been the debates over Internet ‘piracy’ and the attempts by copyright owners to rope internet service providers into becoming copyright police: in Australia through the iiNet litigation;<sup>1</sup> in other countries through legislation.<sup>2</sup> Efforts to have online service providers like eBay enforce trade marks too have attracted some attention. Less visible in Australia, but controversial elsewhere, have been Europe’s efforts to enforce patents and trade marks by detaining shipments of generic drugs destined for developing countries.

The substantive standards found in international IP treaties are detailed and prescriptive, creating an international web of rights, but the enforcement provisions of most international IP treaties are far less detailed. The enforcement provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for example, have been described as its ‘Achilles’ Heel’.<sup>3</sup> The truth of the description – at least from a right holder perspective – was graphically demonstrated when the US took China to task over its standards of criminal enforcement of IP before the WTO – and mostly lost.<sup>4</sup> Small wonder, then,

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\* **Editors Note:** A further official draft of the ACTA was released by the Department of Foreign Affairs and Trade on 6 October 2010. The draft text is available at <http://www.dfat.gov.au/trade/acta/>.

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1 Roadshow Films Pty Ltd v iiNet Ltd (No 3) (2010) 83 IPR 430.

2 Below n21 and accompanying text.

3 Jerome Reichman and David Lange, ‘Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions’ (1998) 9 Duke Jnl Comp. & Int’l L 11, at 34.

4 China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Report of the Panel, WT/DS362/R, January 26, 2009.

Volume 29 N° 2  
September 2010

### Inside This Issue:

Setting Global Standards for IP Enforcement: The Anti-Counterfeiting Trade Agreement

Will A New Communications Act be Allowed to Work?

A Win for YouTube

Nintendo v Playables: Circumvention of Copy Protection Devices on Games Consoles

Journalist Shield Laws

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# Contents

## Setting Global Standards for IP Enforcement: The Anti-Counterfeiting Trade Agreement

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## Will A New Communications Act be Allowed to Work?

Mark Armstrong discusses the political context affecting communications law reform.

## A Win for YouTube

Deborah Healy provides an update on the copyright dispute between Viacom and YouTube.

## Nintendo v Playables: Circumvention of Copy Protection Devices on Games Consoles

The High Court in the United Kingdom recently decided a case on the circumvention of copy protection devices under the Copyright, Designs and Patents Act 1988 (UK). In this article, Brett Farrell provides a summary of the case and discusses the implications of the decision for the gaming industry.

## Journalist Shield Laws

Commonwealth legislation protecting journalists has been in place since 2007. New South Wales is the only state that has enacted shield laws but they do not offer the same level of protection as the Commonwealth laws. In this article, Matthew Tracey suggests that the shield offered by both legislative regimes is inferior in comparison to the United Kingdom and New Zealand and that the level of protection afforded to journalists sources could be significantly strengthened by the incorporation of a presumption in favour of non-disclosure. At the time of publication, Liberal Senator and Shadow Attorney-General, George Brandis, has introduced a private members bill to the Senate in line with legislation in New Zealand which represents stronger protection for journalists. Independent Senators Xenophon and Wilkie are expected to introduce similar legislation that will attract the support of the ALP.

that at the behest of IP right holders concerned about rampant infringement,<sup>5</sup> we have seen moves to 'beef up' enforcement rules: in the World Intellectual Property Organization (**WIPO**), in the TRIPS Council, in the World Customs Organization<sup>6</sup> – and now through negotiation of a free-standing agreement: the Anti-Counterfeiting Trade Agreement, or ACTA.

The negotiations for the ACTA are plurilateral: as well as Australia, they involve the United States, Japan, the 27 nations of the European Union, Switzerland, Canada, Singapore, South Korea, New Zealand, Morocco and Mexico. The stated goal is "to provide a high-level international framework that strengthens the global enforcement of intellectual property rights." Discussions commenced in 2007, and the eleventh round was held in late September 2010 in Japan.

This article briefly outlines progress of negotiations on the ACTA and explores some of its substantive sections and concerns they

might raise, particularly for Australia and particularly for those interested in Australia's communications infrastructure. As will be seen, over time the text of the ACTA has been watered down, or perhaps more appropriately, abstracted up to create high-level obligations already met by Australian law. This makes the agreement perhaps less immediately dangerous to the interests of users and business – but at the same time, makes the longer term impact harder to predict.

## The negotiations and the issue of transparency

The ACTA is, at first glance, a strange beast. It is counter-intuitive to negotiate on prevention of counterfeiting amongst a group of countries not including the major sources of counterfeit goods.<sup>7</sup> But the ACTA is part of a broader movement.

Attempts to raise enforcement in multilateral fora have not been successful. In the TRIPS Council, developing countries have resisted

5 Not all right holder organisations have indicated enthusiasm for the ACTA negotiations. For example, the Intellectual Property Owners Association, an umbrella group that includes a number of U.S. pharmaceutical, chemical, software, and industrial firms, has expressed concern about its broad scope: see Michael Gabriel, 'ACTA, Fool: Explaining the Irrational Support for a New Institution', PIJIP Working Paper No 7, 2010, at 6.

6 For one summary of the various efforts, see Susan Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: the State of Play,' Qsensato Occasional Paper No. 1 2008 (Geneva). <http://www.iqsensato.org>.

7 Of the top 10 countries of departure of counterfeit goods reported by the World Customs Organization in 2008, only one – the United States itself – is part of ACTA. The top 10 (top 9, in fact, because sometimes the departure country is 'unknown') were in descending order; China, Unknown, Hong Kong (China), India, Thailand, Turkey, United Arab Emirates, US, Poland and Hungary: World Customs Organization, Customs and IPR Report 2008, at 9.

***It is counter-intuitive to negotiate on prevention of counterfeiting amongst a group of countries not including the major sources of counterfeit goods. But the ACTA is part of a broader movement.***

calls to put IP enforcement on the agenda; in WIPO the push for stronger enforcement has been countered by demands for progress on development issues. ACTA can be seen as a 'shift of forum' to a more select, friendly forum.<sup>8</sup> The ACTA negotiations are, in other words, a 'coalition of the [countries] willing' to commit to strong international enforcement rules. The longer-term goal would be to have the rules adopted by other countries. The negotiators have stated that the ACTA will constitute "a new, higher benchmark for enforcement that countries can join on a voluntary basis", and the publicly-released negotiating text of the ACTA includes provisions to enable a broader membership, including developing countries, with accession processes and provisions to allow for technical assistance and capacity-building for developing country members seeking to join.<sup>9</sup> According to the Department of Foreign Affairs and Trade (DFAT), "Australia regards the extent to which the ACTA can attract support from countries in our region as one important issue in determining the value of the ACTA for Australia".<sup>10</sup> As for how this might occur – well, the US, EU and Australia all have a history of requiring bilateral trade partners to sign up to existing international IP agreements.<sup>11</sup>

Thus the plurilateral set-up of ACTA does have a certain weird internal logic. If you cannot make progress multilaterally you try to make progress with the 'willing' and look to expand later, once a consensus model is built. But the logic is more shaky once we realise two things. First, there are reasons why there hasn't been progress on IP enforcement in multilateral fora: for example, legitimate concerns that such provisions will be used as a club against countries choosing not to spend precious resources on enforcing foreign private rights, or perhaps the belief on the part of developing countries that enforcement is a quid for which there must be a pro quo, such as genuine progress on the Development Agenda, or on other non-IP matters in the World Trade Organization's Doha Round. Second, bringing on board countries excluded from the negotiations will be even harder later. In the end, no IP enforce-

ment agreement is going to be effective without the involvement of major non-Western powers. China, India, and Brazil have all criticized the negotiations and the agreement.<sup>12</sup>

Apart from their exclusive nature, a second source of criticism has been the veil of secrecy surrounding the negotiations. The negotiators signed 'confidentiality agreements',<sup>13</sup> and in the early stages, even the negotiating agenda was not clearly identified. Faced with a Freedom of Information request, the Obama Administration told a US court that the key ACTA documents were classified for national defence or foreign policy reasons.<sup>14</sup> There has been one official release of the text, in April 2010, which occurred only after five years of closed-door negotiations and only after the full text was leaked. Despite considerable changes to the text since (apparent from subsequent leaks) no further official text has been published.<sup>15</sup> According to statements issued by the negotiators, this secrecy is part of the normal process of treaty negotiation.<sup>16</sup>

Like the selection of the negotiating group, the secrecy does have a certain internal logic. Discussions are easier without hundreds of journalists and blogs scrutinizing every detail. However, it has costs. From the very beginning, it generated paranoia. We saw at times wild speculation regarding the possible contents of the agreement: widespread ISP filtering for copyright-infringing material; border searches of laptops and iPods; even confiscation of electronic equipment.<sup>17</sup> The public reaction was not helped by the

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fact that certain mostly IP-holding stakeholders were consulted.<sup>18</sup> Even the EU Parliament weighed in, passing a resolution in March 2010 calling for greater transparency.<sup>19</sup>

Nor is the concern about transparency expressed by critics a past debate about the negotiations. ACTA will, if concluded, set up a new international institution, the ACTA Committee, which will meet yearly. It will receive reports on implementation, establish ad hoc committees – and take a leading role in future amendments of the text, which can occur if all the Parties agree. There is nothing in the text that would require widespread consultation or discussion before such an amendment occurred. This gives rise to a legitimate concern that amendments will happen, in the future, with little opportunity for public input (or opposition).

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8 Susan Sell, above nvi; Laurence Helfer, 'Regime-shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29 *Yale J. Int'l L.* 1.

9 ACTA April Text Article 3.3.

10 <http://www.dfat.gov.au/trade/acta/index.html>.

11 See US-Australia Free Trade Agreement (signed May 18, 2004; in force January 1, 2005) (AUSFTA), Article 17.1.2-17.1.5 (corresponding provisions are found in other US FTAs; see also Singapore-Australia Free Trade Agreement, signed 17 February 2003, Entry into force: 28 July 2003, Article 2; Free Trade Agreement between the EU and the Republic of Korea, signed October 15, 2009, Article 10.5 (affirming various copyright treaty provisions), Article 10.16 (trade marks), 10.33 (patent), and Article 10.39 (plant varieties).

12 All three countries made critical statements at the July 2010 meeting of the TRIPS Council. A summary of the meeting and discussion is published on the WTO's website at [http://www.wto.org/english/news\\_e/news10\\_e/trip\\_08jun10\\_e.htm](http://www.wto.org/english/news_e/news10_e/trip_08jun10_e.htm).

13 IP Watch, 5 June 2008, 'Speculation Persists on ACTA as First Official Meeting Concludes', available at <http://www.ip-watch.org/weblog/index.php?p=1082>.

14 'NGOs Withdraw ACTA Lawsuit, Blast USTR For Lack Of Transparency', Inside US Trade, 19 June 2009.

15 As a result, the analysis in this paper draws both on the 'Public Deliberative Draft' dated April 2010, as well as leaked texts dated January 2010, July 2010, and August 2010. All four texts have been published online, including at the website of the Program on Information Justice and Intellectual Property (PIJIP) at the American University, Washington: <https://sites.google.com/site/iipenforcement/acta>.

16 But see the attachment to an NGO letter dated 22 July 2009, addressed to the US Trade Representative, comparing other IP treaty negotiations. The letter and attachments are available at <http://keionline.org/content/view/246/1>.

17 See for example IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA), 25 March 2008, available at [http://ipjustice.org/wp/wp-content/uploads/IPJustice\\_ACTA-white-paper-mar2008.pdf](http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf).

18 Peter Yu, 'Six Secret (and now open) fears of ACTA' (2010) 63 *Southern Methodist University Law Review* (2010); available at SSRN: <http://ssrn.com/abstract=1624813>, at page 27.

19 European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7\_TA(2010)0058.

## ***This gives rise to a legitimate concern that amendments will happen, in the future, with little opportunity for public input (or opposition).***

ACTA is an exclusive club: it has excluded both source countries and the public. Within the charmed circle, it probably makes sense. To those watching from outside, however, the negative effects on confidence in the fairness of the IP system are clear. As I have noted elsewhere:

The secrecy is... operating, once again, to bring intellectual property law into disrepute. To the extent that at some later point governments and IP owners will ask people to accept the outcomes as 'fair' and ones that should be adopted, it will be more difficult to convince them when the agreement has the appearance of a secret deal done with minimal public input. Since neither copyright, nor trade mark, are readily 'self-enforcing' laws they depend for their effectiveness on a certain amount of support among the public. Secret negotiations on IP policing powers are not an ideal way to garner such support.<sup>20</sup>

### **Substantive sections**

Whatever the concerns about process, the substance of the agreement will, subject to some comments below, have the greater long-term impact. In this section, I review the basic parameters of the ACTA text – noting that until the agreement is concluded, we cannot know the final details. As will become clear, ACTA today is not quite the all-encompassing and terrifying agreement it might have been: negotiations have removed some rough edges. What this means for the future is unclear.

### **Enforcement in the Digital Environment**

I will start with the section of the ACTA most relevant to those interested in Australia's communications infrastructure: the section titled 'Enforcement of Intellectual Property Rights in the Digital Environment'. In its earlier incarnations, this section included several strong provisions:

- a general obligation to ensure the availability of enforcement measures "so as to permit effective action" against online infringement;
- a provision 'affirming' that the Party recognises 'third party liability';
- safe harbours for online service providers, including network access providers, web hosts and search engines, subject to the service provider taking action against infringement – such as 'notice-and-takedown';
- anti-circumvention rules: that is, prohibitions on people circumventing, or distributing tools to circumvent, technical 'locks' used by copyright owners to limit use of their material; and
- the protection of rights management information.

Early on, civil society groups feared that ACTA would mandate the adoption of 'three-strikes' rules (also known as 'graduated response'). Such rules would require ISPs to cooperate actively in copyright enforcement with an escalating scale of penalties to be applied to subscribers identified by right holders as infringing: starting with a warning letter, through to technical measures (such as throttling) and even termination of service. Three strikes systems of varying forms have been introduced in the United Kingdom, France, South Korea, and are being discussed in New Zealand.<sup>21</sup> Early ACTA draft text seemed to confirm this fear.<sup>22</sup>

Over the course of the negotiations, the digital chapter has been gutted. According to the latest leaked text, dated August 2010, we now have provisions:

- to require Parties to "provide the means to address" infringement via technologies that facilitate widespread infringement – such as unlawful file-sharing – without creating barriers to legitimate activity and preserving freedom of expression, fair process, and privacy. In a footnote, safe harbours are given as an example of an implementation that would be consistent with the provision;
- that Parties shall "endeavour to promote cooperative efforts within the business community to effectively address infringement", while preserving legitimate competition, freedom of expression, fair process, and privacy;
- requiring Parties to give authorities the power to order expeditious disclosure of information about subscribers where right holders "have given legally sufficient claim with valid reasons to be infringing" rights, "for the purpose of protecting" those rights;<sup>23</sup> and
- quite general anti-circumvention and rights management information provisions.

The new draft does not contain any clear or certain protection for online service providers: we are left with vague exhortations to protect free speech, privacy, and competition and a footnote. Exhortations can be useful, no doubt, but not nearly as helpful to online service providers as the safe harbours already found in European, American, and to some extent Australian law.<sup>24</sup> This may, however, be the price of one very real improvement: the removal of references to secondary liability.

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The revised digital environment section will not require changes to Australian law. No doubt some will argue that Australian law does not "provide the means to address" file-sharing if the Full Federal Court upholds the trial judge's ruling in iiNet that a large network

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20 Kimberlee Weatherall, 'The Anti-Counterfeiting Trade Agreement: What's It All About?', <http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=kimweatherall>, at 3.

21 Digital Economy Act 2010 (UK) ss 3-16 (new ss 124A-124N, Communications Act 2003 (UK)); Loi favorisant la diffusion et la protection de la création sur Internet (also known as the 'HADOPI law'), 2009 (France); Copyright Act (Korea) s 133bis. In New Zealand, s 92A of the Copyright Act 1994 (NZ), introduced by the Copyright (New Technologies) Amendment Act 2008 (NZ) would have introduced a three-strikes system. The provision was repealed and a proposed replacement may be found in the Copyright (Infringing File Sharing) Amendment Bill 2010 (NZ). At the time of writing this bill is before the Commerce Committee, due to report on 22 October 2010.

22 See Yu, above nxviii, 57-58.

23 This would not require a change to Australian law, which already confers such power on the Federal Court under Rule 15A Federal Court Rules (Cth).

24 The safe harbours in Australia are not presently useful to most online service providers because they are limited to carriage service providers: see Copyright Act 1968 (Cth) Pt V Div 2AA.

access provider was not liable for authorizing infringement by its users when it did not respond to allegations of infringement by copyright owners.<sup>25</sup> Such a claim would be more rhetorical than legal: it would be hard to prove a 'breach' of the ACTA provision. In any event, such claims about the inadequacy of Australian law post-iiNet will be made with or without an ACTA.

### ***Criminalisation of online non-commercial end-user activities is particularly controversial.***

The revised digital enforcement provisions of ACTA, however, could be seen, not so much as a set of rules, but as a framework of expectations: that something will be done about online infringement, that online service providers like ISPs will cooperate on enforcement, and that the signatory governments will take an active role in ensuring both. No doubt this text will become a frequently-used rhetorical tool in the battles for control of the online environment.

A further implication of setting up obligations framed as expectations rather than clear rules is that they will change. This has both benefits and costs. The benefits of flexibility are perhaps obvious: they allow for policy innovation that can assist both rights holders and users. On the other hand, obligations of this kind set up the framework for constantly rising cycles of reform as existing laws are deemed 'ineffective' and new 'best practices' emerge, and spread. They make the longer-term impact of the ACTA, therefore, much more difficult to predict.

#### **Criminal Enforcement**

Another controversial aspect of the ACTA is the criminal section. The US has been particularly vehement in its desire to secure more elaborate international criminal provisions in copyright and trade mark: a desire no doubt sharpened by the recent failure in its WTO case against China.<sup>26</sup>

Criminalisation of online non-commercial end-user activities is particularly controversial. Early drafts proposed by the US would have imposed criminal liability on any copyright or trade mark infringement for purposes of commercial advantage or private financial gain (no matter how low the quantity) and non-commercial infringement of sufficient extent to affect prejudicially the copyright owner. These proposals appear to have foundered on the rock of EU and other opposition. Notably, criminalization of IP in the EU has a chequered history: the EU dropped criminal provisions from its IP Enforcement Directive in 2004,<sup>27</sup> and a proposal for a 2<sup>nd</sup> IP directive ('IPRED2') including criminal provisions is on hold.<sup>28</sup>

The August 2010 leaked text is less stringent, particularly against end-users. An 'anti-camcording offence', designed to criminalise the recording of movies in cinemas, has disappeared – a good

thing, given the plethora of relevant offences already found in Australian law.<sup>29</sup> ACTA will also allow Parties to exclude end-user infringement. There is still an expansion of the TRIPS framework in that any willful commercial infringement will have to be criminal (regardless of quantity). This is unfortunate, even if it doesn't change Australian law: IP infringement is too easy to be so readily criminalised and overcriminalisation has well-known negative effects.<sup>30</sup>

There are a whole series of other criminal provisions in the ACTA draft: aiding and abetting liability, criminal liability of companies; forfeiture and destruction of implements; and seizure of the proceeds of IP crime. None of these provisions would require changes to Australian law.<sup>31</sup> Again, however, their inclusion is unfortunate, because we do not know what they mean. Most obviously in the communications context, what does it mean to 'aid or abet' IP infringement? Could a web host 'aid or abet' infringement it knows is occurring? We do not know, because such rules are untested – which would suggest that we should hold off on putting them in a treaty.

### ***Less frequently discussed, but still important, are the civil enforcement provisions.***

#### **Civil Enforcement**

Less frequently discussed, but still important, are the civil enforcement provisions. These cover the availability and calculation of damages; injunctions; preliminary procedures (like Anton Piller or seizure orders), and the like. Three aspects of this section have been most troubling: the provision for calculating compensatory damages; a proposal for statutory damages, and a proposal to make injunctions available against non-infringing intermediaries.

As to the calculation of compensatory damages, the proposal is to expand the list of measures of damage that a court must consider if submitted by a complainant to include "any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price". This is controversial enough in the copyright context: whoever thinks that every illegal download or illegal copy is a lost sale? It is even more controversial if the provisions extend to patent. How could it possibly make sense to refer to the "value of the infringed good" when you are talking about a patent over a minor component of a complex electronic good? A judge can always reject the evidence, but why require a court to waste the time?

As for statutory damages, a fear was that ACTA would require these pre-set figures for damages that have enabled right holders in the US to claim astronomical sums in the context of online or mass infringement.<sup>32</sup> The latest texts, however, have 'additional

25 Roadshow Films Pty Ltd v iiNet Ltd (No 3) (2010) 83 IPR 430.

26 TRIPS Article 61. See China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Report of the Panel, WT/DS362/R, January 26, 2009.

27 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004); published with corrigendum in OJ L 195, 02.6.2004, P. 0016 – 0025.

28 Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, April 26, 2006, COM/2006/0168 final; COD 2005/0127 \*/ ('IPRED2'). See Monika Ermert, 'ACTA May Prompt Quick Restart to EU Harmonisation of Criminal Enforcement of IP', Intellectual Property Watch, December 21, 2009. In May 2010, the Presidency called upon the Council and the European Parliament to 'consider as soon as possible legislation on criminal measures aimed at ensuring the enforcement of intellectual property rights': The Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, O.J. C 115/1, 4 May 2010.

29 See Kimberlee Weatherall, ACTA - Australian Section by Section Analysis (April 2010); Available at: <http://works.bepress.com/kimweatherall/21>, at page 42-43.

30 Douglas Husak, Overcriminalization: The Limits of the Criminal Law (Oxford University Press 2008), 20.

31 Weatherall, *ibid* at 43-47.

## ***It bears repeating: ACTA is a very odd beast.***

damages' (that is, the current Australian system) as an alternative, so it looks like such an amendment will not be required.

Still troubling, particularly in the online context, is Europe's continued push for courts to have the power to order an injunction against an intermediary whose services are used to infringe IP rights.<sup>33</sup> If accepted, this could lead to legal reform in Australia.<sup>34</sup> The usual rule is that an intermediary should be infringing (for example, by authorization) before an injunction is ordered; orders should be made against an alleged or convicted wrongdoer, putting them at risk should they fail to comply. Involving intermediaries in enforcement of rights, perhaps requiring them to take active steps, under pain of contempt of court,<sup>35</sup> arguably creates a new role for intermediaries as the (temporary and permanent) enforcement arm of the courts.

### **Other provisions**

It is not possible to discuss the rest of the ACTA. The recitations at the beginning of the text are interesting and questionable. The border measures provisions, for detaining goods on import, export, or in transit, are and remain controversial. There are extensive provisions on international cooperation and the sharing of 'best practices' which are broad and could create extensive new reporting and sharing obligations and more IP bureaucracy. If I were a member of the Federal Police, I'd be concerned about the provision requiring Parties to "encourage the development of specialized expertise within its competent authorities responsible for enforcement of intellectual property rights" (don't they have better things to do?). But all these are debates, and details, for another day and another audience.<sup>36</sup>

### **Concluding comments**

What are we to make of all this? It bears repeating: ACTA is a very odd beast. It is an agreement negotiated between countries who already enforce IP rights, for the establishment of enforcement 'standards', that may well end up changing very little local law given the quite broad language it now contains.

By reason of the way in which it has been negotiated, if concluded, ACTA will have little or no claim to moral high ground or legitimacy. Nor is the process the only factor damaging any credibility the ACTA might have. It may not be entirely clear from the discussion in this paper, but reading the text reveals that this is a very one-sided agreement: not because interests and rights other than those of right holders aren't recognised – they are. But they are not protected. The rights of IP owners are repeatedly set out in detail and only limited abrogations of those rights are allowed. In contrast, for the benefit of defendants, users, and other people interacting with IP-protected material, there are vague exhortations dotted through the text stating only that enforcement measures must 'preserve' important things like free speech, privacy, competition, or fair process. There is not a word about what that might mean and nothing

more concrete. In this sense, ACTA contrasts unfavourably with TRIPS, which has specific protections for defendants. Even the public education provisions of ACTA are unbalanced, requiring parties to promote measures "to enhance public awareness of the importance of respecting intellectual property rights and the detrimental effects of intellectual property rights infringement".

One is left, at the end of an analysis of the various draft texts, wondering whether the game has been worth the candle. More recent texts suggest that ACTA will be a better (or at least less nasty) agreement than first thought or feared – many of the most controversial provisions have been considerably watered down, qualified or removed. But was it worth 11 rounds of negotiation and countless hours of work on the part of the trade officials involved? Is it worth the ongoing compliance costs and the damage that has been done to the reputation of the IP system?

***By reason of the way in which it has been negotiated, if concluded, ACTA will have little or no claim to moral high ground or legitimacy.***

Importantly: will right holders see any benefit at all? For them to see a benefit, there would surely have to be a reduction in infringement and an increase in sales of legitimate product. For that to happen, there would need to be more enforcement – by the police, by online intermediaries, or perhaps by right holders at lower cost. The only concrete devotion of resources you will find in the ACTA text is the commitment to have yearly meetings. I'm not sure more bureaucracy will solve anyone's problems. In fact, I would say that I think ACTA is likely to fail to achieve much.

The only way that ACTA could be worth the effort put in is if it is part of a much longer game. If ACTA as now drafted fails, what then? Unfortunately, we know. The yearly meetings of the ACTA Committee will hear reports of continued disastrous infringement. Ad hoc committees will be established. And the Committee will be called on to consider (strengthening) amendments. And that is why, in the end, despite all the softening of the language, ACTA remains something to be concerned about from a user point of view, and from the perspective of any business that deals with IP-protected material. It creates a new framework of expectations for enforcement and the potential for rising obligations over time.

Infringement is a problem. If there were a magic bullet to end it, surely it would already have been discovered. One thing I am certain of. A treaty negotiated in this way and with this one-sided outcome is not that bullet.

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32 UMG Recordings, Inc v MP3.com, Inc No. 00 Civ. 472 (JSR), 2000 WL 1262568, at \*1, \*6 (S.D.N.Y. Sept. 6, 2000): where a judge proposed to make an order for \$25,000 per infringed CD –where 4,700 CDs were in issue (total US\$118M); Capitol Records v. Thomas-Rasset 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008), a peer-to-peer (p2p) filesharing case, in which a jury awarded \$80,000 per infringed song, for a total award of over \$1.92 million, despite the trial judge's estimate of actual damages of around \$50.

33 This proposal matches the position in the European Union, where the Information Society Directive, Art 8.3 imposes an obligation in almost identical terms: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. L 167, 22/06/2001 P. 0010 – 0019.

34 The provision carries a footnote stating that the "[t]he conditions and procedures relating to such injunction will be left to each Party's legal system." This still suggests legal reform. It is also true that injunctions against intermediaries are not unheard of in Australian law: the courts have a fairly general power to 'make good' their orders as necessary. Whether this is enough to comply with a requirement under the ACTA text is the question.

35 Which "must realistically be seen as criminal in nature": Witham v Holloway (1995) 183 CLR 525 at 534

36 For more in somewhat excruciating detail, see Weatherall, above n20 and n29.

# Will A New Communications Act be Allowed to Work?

Mark Armstrong discusses the political context affecting communications law reform.

A new Communications Act for the information age is a good idea, but will it be subverted? The answer depends on whether institutions which now deal with the media will be reformed. A new Act could offer a revised taxonomy of the new and old media platforms, but fail to meet the challenges in practice.

The Minister reportedly told the Australian Information Industry Association in July 2010 that "If elected, the Labor government will move to commence a comprehensive review of communications regulations", to consider things such as:

- all media platforms, including free TV, subscription, video on demand, IPTV and mobile TV;
- appropriate licensing, regulatory obligations and consumer protection arrangements across all platforms;
- audience reach rules for television; and
- how Australian content can be delivered in future.

Those topics all deserve analysis, followed by bold decisions for the future. However, some people calling for the review may not have thought about what will make reforms viable in the information economy.

Here are a few illustrations of essential changes needed to give any substantive changes in the law a chance of success. They show how decisions about media platforms have been dealt with in the last 10 years, mostly involving the Broadcasting Services Act 1992 (Cth) (**Broadcasting Services Act**). The same issues will affect new platforms including the Internet, mobile, VOIP and other services under any new laws, whatever the titles of converging Acts.

## Can the continuous amendments be stopped?

Most of the laws which now distress people are to be found in the Broadcasting Services Act. When enacted in 1992, it had a simple, coherent scheme. The original Act was about 10 per cent the size of the current version. One might agree or disagree about particular policies contained in the Act. Nevertheless, there was a consistent, durable structure and set of concepts. The scheme of that original Act could have been updated organically over the last 20 years, to resolve most of the issues which are now causing distress. The reason we have a mess is not some inherent problem in the 1992 Act. The mess has been created by frequent, short-sighted amendments.

As each of the new services and issues came along, including various forms of digital broadcasting, datacasting, IPTV, Internet, 'anti-siphoning', local content in regional areas and Internet censorship, they could have been accommodated within the original structure, or the structure could have been expanded in a consistent way. Instead, each change was inserted in a sheaf of prescriptive, turgid pages.

The 1992 Act was like a cleanly-written computer program. The continuous amendments have been like patches added by later programmers, written in spaghetti-style code, with little regard for the logic or structure of the original. As each year passed, the disregard for the parent Act became greater. Why would anybody want the communications laws to be turned to spaghetti?

Unless we can expose the causes and stop them, the huge effort of revising the current Acts will make little difference. The temptation

is to blame parliamentary counsel for bad drafting, but the real causes lie in the modus operandi of governments since 1992.

## Ministers or media managers?

The greatest single cause is that over the last 20 years, the executive government has tried, increasingly, to directly micro-manage communications: especially media, which are of more interest to governments than any other sector. The Coalition and Labor parties seem to have been in competition to see which of them could exert the highest level of direct control over media growth. Perhaps they share the winner-takes-all idea: when you win government, all the spoils are yours to distribute. Ironically, much of this intervention was disguised as advancing competition, deregulation or micro-economic reform.

The Fraser and Hawke governments had a less interventionist approach to media. The current trend seems to have started with Senator Graham Richardson, who became Minister at the key stages of drafting instructions for what became the Broadcasting Services Act. The modus operandi he explained in his 1994 book *Whatever it Takes* has persisted throughout the Howard era from 1992 until the current day.

*A new Act could offer a revised taxonomy of the new and old media platforms, but fail to meet the challenges in practice.*

The Minister-driven approach is based on personal negotiation and dealmaking. When the Minister has completed negotiations with the parties, it is time to cement the deal. If it were a negotiation between private parties, a contract would be signed. But since we are dealing with public policy, what better instrument than an Act? So the Parliament is used as a kind of notary public, to entrench the deal into Australian law. That seems to be a reason why amendments to the Act tend to ignore the fabric of the parent Act. The purpose of the amendments is to entrench the details of the deal, not to update the Act.

In a Parliament with a mind of its own, amendments would take the form of principles and basic rules, to be applied through the ordinary processes of public administration. But in modern Australia, Ministers and governments have not usually trusted public administrators to decide on the merits how to implement the principles. Their goal is to ensure that nothing will be changed without the consent of the parties.

## Restoring parliament's role

Are there any prospects that the forward-looking principles of a new Act will be respected by governments in future? The best prospect would be for the houses of parliament to function as they are intended, rather than tolerating shoddy amendments. Two developments raise some hope: a new House of Representatives in which independents might succeed in some procedural reform; and a Senate in 2011 where the Greens might restore scrutiny and lawmaking. The Democrats ensured that that function was per-

formed in the time of the Fraser and Hawke governments. The major parties tend to compromise themselves on media issues, so minor parties are particularly important.

The 'winner takes all' approach of the major parties has some unintentional allies among the big Commonwealth departments, especially Treasury and Finance. We can be grateful that these departments are aggressive watchdogs, always ready to guard the public purse, and to seize any opportunity for new revenue. Then there are departments like Prime Minister and Cabinet, keen to remove any obstacles to the goals of the Prime Minister. That is healthy too. The problem comes when there is no counter-balance to these imperatives.

### ***The Minister-driven approach is based on personal negotiation and dealmaking.***

In the last decade, the parliament, the courts, and the rule of law have often been derided as obstacles to 'the Government' (meaning of course the executive government) from implementing its plans. Due process has often been derided as a selfish attempt by lawyers to make money for themselves. If the executive government announces that a change constitutes economic reform, then of course the Parliament (and by implication the Constitution) have to 'get out of the way.'

A good example of recent thinking by federal departments was the Uhrig Report of 2001, which told us that 'the role of government is to govern'. This report recommended that Ministers should be given increased their control over statutory bodies. This led to the executive seizing even more control over the Australian Communications and Media Authority (**ACMA**) through the neutral-sounding Financial Management and Accountability Act 1997 (Cth)

Many people are unaware that powers given by the laws to Ministers are actually exercised by Departments. Furthermore, there is a hierarchy of Departments. Regardless of which party is in power, PM&C, Treasury and Finance are at the top, and Communications is usually towards the bottom. So the Department of Broadband Communications and the Digital Economy often gets the blame for policies for which it is only an agent of the big departments.

A classic case of the hierarchy is in spectrum allocation. Finance and Treasury are major participants in spectrum policy. They aim to extract the maximum revenue in the shortest time from broadcasters and telcos. This tax-gathering attitude to a public resource is nicely concealed by the mantra that spectrum fees are determined by auction. So the market is demanding high prices, not the government. This overlooks the reality that there are many different ways to parcel the spectrum for sale, and the packages which ensure the highest price in the short term are not necessarily the most efficient.

### **Executive government and media independence**

The example of spectrum allocation links back to another challenge for the writing of any new Act. A durable, efficient Communications Act would need to be implemented by an authority with expertise and independence. Without that, the Act would need to be excessively detailed, and subject to the same flood of amendments which made spaghetti of the Broadcasting Services Act, the Telecommunications Act 1991 (Cth) and the Radiocommunications Act 1992 (Cth); and for that matter the Broadcasting & Television Act 1942 (Cth). Will the executive government tolerate an Act based on stated principles, plus an authority which implements those principles with the level of independence found in most developed economies?

The opposite result would come from a Communications Act which confirmed the trend of the last 10 years. The executive government

would be intervening in a whole range of issues about information and freedom of speech. The problem is that the executive government is an interested party: in fact, it is the most interested party of all. Governments have a close interest in being favourably treated by the media, new or old, in print or online.

All governments spend a lot of their time cultivating favourable coverage. That is why nearly all developed countries have an independent regulator, and usually an independent planning and policy body. The big exception is Italy, where the influence of the media proprietor/prime minister Berlusconi seems to override the institutions.

The Broadcasting Services Act saw the Australian Broadcasting Authority (**ABA**) created with a narrower role than its predecessor. Even the function of the former Broadcasting Tribunal to assemble information about broadcasting, and the obligation to make information available, were removed. So were most of the public processes which provided the opportunity to test and challenge the information on which decisions were based.

Another example of the gradual erosion of rights related to international covenants. One of the few opportunities to raise freedom of communication issues, namely section 160(d) of the Broadcasting Services Act was repealed in 1999. A rather technical explanation for this, involving the CER treaty with New Zealand, was offered to the Parliament. There was no reference to the fact the change would shut the door to the ABA being forced (or even allowed) to consider free speech issues raised under the International Covenant on Civil and Political Rights. The limits on the ABA were then transferred to the ACMA, which we now have.

### **Thinking ahead**

We have reached the point where there is little similarity between the authorities which deal with new or old media content in Australia and the organisations with which it used to be compared, such as: the FCC (US), the CRTC (Canada) or Ofcom (UK) and the other Western European countries. People often say how much useful information is to be found in the reports which come from those sources. They rarely consider why we no longer have those sources in Australia.

## ***A durable, efficient Communications Act would need to be implemented by an authority with expertise and independence.***

In the last 10 years, how many Australian reports have offered frank, forward-looking or positive directions for the future of our media? There has been plenty of good, conscientious work by dedicated people in our organisations, but it is difficult for people tied to the executive government to offer fresh and positive thinking. Rightly or wrongly, they are not permitted to challenge the status quo. They are more likely to focus on 'enforcement' which is what you can expect when the official structure does not allow forward thinking.

The point of all this is that our institutions have been degraded by political conflict of interest and by parts of the executive government which have no interest in communications. Until reform of those structures is demanded by the Parliament or communications players, then no rewriting or merging of Acts or re-categorising of different kinds of media is likely to do much good.

**Mark Armstrong is the Director of the Network Insight Institute**



# A Win for YouTube

## Deborah Healey provides an update on the copyright dispute between Viacom and YouTube.

YouTube has won summary judgment in a suit by Viacom for infringement of copyright over videos placed on YouTube conducted in the United States. The fact that YouTube removed videos which infringed the Viacom copyright immediately once notified of their status was instrumental to the outcome. The case may be instructive in relation to similar provisions of the Copyright Act 1968 (Cth).

### *Viacom argued that YouTube actually welcomed copyright infringing material on its website.*

YouTube, owned by Google, operated a website at <http://www.youtube.com>, and users could upload video files free of charge. Files were copied and formatted by YouTube's computer systems and made available for viewing. Viacom, the owner of MTV and Paramount Pictures, claimed breach of copyright for "tens of thousands of videos taken unlawfully from its copyrighted works" without its permission, which were displayed on YouTube. Football Association Premier League Limited, the owner of one of the most popular sporting competitions in the world, was also a plaintiff.

Viacom argued that YouTube actually welcomed copyright infringing material on its website. It argued that YouTube did not qualify for 'safe harbour' protection available under the Digital Millennium Copyright Act (US) (the **Act**) because it had actual knowledge of the infringing conduct, and was also aware of facts or circumstances from which the infringing activity was apparent. Proof of these facts would have taken Viacom outside the protection offered by the safe harbour provisions. Viacom argued that YouTube was not protected but was liable for "intentional, vicarious and direct infringement" (to use the wording of the Act).

In reaching its decision the Court looked at the purposes of the Act using extrinsic material. The Court stated that the Act was designed, among other things, to limit the liability of online service providers for copyright infringement for merely transmitting information over the Internet. Service providers were, however, expected to remove material from users' web sites if they appeared to constitute copyright infringement. The critical question for evaluation in the case, the Court said, was whether the wording of the Act, "actual knowledge that the material or an activity using the material on the system or network is infringing" and "facts or circumstances from which infringing activity is apparent" (sections 512(c)(1)(A)(i) and (ii)) meant that the service provider needed only a general awareness that there were infringements or needed actual or constructive knowledge of specific and identifiable infringement of individual items.

YouTube argued that it was entitled to safe harbour protection under the Act for all Viacom's claims because it had insufficient notice of the particular infringements. In any event, it had appointed a designated agent under section 512(c)(2) and when that agent was informed that a particular item infringed copyright, the item was swiftly removed. There was no dispute that all clips the subject of the suit had been removed immediately notification was received.

In determining the issue the Court looked at the philosophy behind the Act, reviewing legislative history and purposes of relevant provisions contained in documents such as Senate Reports. Informa-

tion considered by the Court indicated that the ease of copying and distributing information worldwide virtually instantaneously meant that copyright owners were unlikely to make their works available without reasonable protections against piracy. On the other hand, the benefits of quick and convenient availability of a vast array of information to the community via the internet could not be ignored. These two positions needed to be balanced. The Court concluded that some limitation of service providers' liability for breach of copyright was necessary to ensure continuing improvement in the efficiency of the Internet and expansion of the quality and variety of Internet services. The safe harbours of the Act had been created to strike a balance between the protection of copyright and the encouragement of dissemination of information. A service provider qualifying for safe harbour protection received the benefit of limited liability.

The impact of the words "does not have actual knowledge that the material or activity is infringing" and "in the absence of actual knowledge is not aware of facts or circumstances from which infringing activity is apparent" in section 512(c)(1)(A)(i) and (ii) were that service provider would have no obligation to seek out copyright infringement but would not qualify for the safe harbour if it had turned a blind eye to so - called "red flags" of obvious infringement.

The notification provisions in the Act, relied upon by YouTube, placed the burden of policing copyright on the copyright holder. The Court confirmed the logic of that burden, stating:

That makes sense, as the infringing works in suit may be a small fraction of millions of works posted by others on the service's platform, whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a 'fair use' of the material, or even whether its copyright owner or licensee objects to its posting. The [Act] is explicit: it shall not be construed to condition 'safe harbour' protection on 'a service provider monitoring its service or alternatively seeking facts indicating infringing activity'....

***The Court concluded that some limitation of service providers' liability for breach of copyright was necessary to ensure continuing improvement in the efficiency of the Internet and expansion of the quality and variety of Internet services.***

The Court noted that the current case showed that the notification regime worked efficiently, evidenced by the fact that when Viacom sent one massive take-down notice for some 100,000 videos, YouTube had removed "virtually all of them" by the next day.

Earlier cases had suggested that red flags may not be raised by use of websites such as 'illegal.net' and 'stolencebrities.com', because the courts were not prepared to impose investigative duties on the service provider. Neither did general awareness of "pervasive copyright infringing, however flagrant and blatant" impose liability on the service provider. In one case involving trademark law referred to by the Court, the fact that a significant number of Tiffany goods sold

on eBay were counterfeit did not mean that a substantial number were not authentic. In that case, while the Court was prepared to find that eBay had generalised knowledge that some portion of the goods was counterfeit, this was not sufficient to impose an affirmative duty to remedy the problem. The provisions of the Act worked in a similar way, the Court concluding:

General knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements.

The Court distinguished the Grokster case and other similar cases, which involved peer-to-peer file sharing networks not covered by the safe harbour provisions. Grokster addressed the more general law of contributory liability for copyright infringement which was

not relevant here, and did not mention the Act. Its business model was quite different to that of YouTube. Another case which was distinguished involved "an admitted copyright thief". A number of other claims by Viacom were dismissed as not affecting YouTube's safe harbour protection.

The outcome of the case is that YouTube's business model is intact. YouTube has reportedly implemented additional detection tools since it was purchased by Google for \$1.6b in 2006.

It is understood that Viacom is to appeal.

**Deborah Healey is a Senior Lecturer in the Faculty of Law, University of New South Wales**

# Nintendo v Playables: Circumvention of Copy Protection Devices on Games Consoles

The High Court in the United Kingdom recently decided a case on the circumvention of copy protection devices under the Copyright, Designs and Patents Act 1988 (UK). In this article, Brett Farrell provides a summary of the case and discusses the implications of the decision for the gaming industry.

In *Nintendo v Playables*<sup>1</sup> Mr Justice Floyd of the UK High Court decided that Playables had both infringed Nintendo's copyright and had circumvented electronic copy protection measures. He also allowed a greater portion of damages to Nintendo in this case than has previously been allowed in similar cases such as *Sony Computer Entertainment Inc. v Ball & Ors*.<sup>2</sup>

Whilst the Nintendo case contained some esoteric legal points which excite lawyers, the practical consequences of this case are not as far reaching for most of the gaming community. In fact, the only people who should be worried by the case are people or companies inside the United Kingdom (UK) who are dealing in devices which can circumvent gaming company security measures or breach their copyright.

*what this case has done is achieve a small expansion of the remedy of damages which a gaming company can claim.*

The issue of circumventing gaming company security measures goes beyond the Defendants in the Nintendo case and if someone wanted a device to circumvent standard copy protection mechanisms, they are most likely available from someone in your local pub or via the internet from outside the UK. This case is not going to stop that. However, what this case has done is achieve a small expansion of the remedy of damages which a gaming company can claim.

If over time the gaming companies keep chipping away (pardon the pun) at these cases, they may slowly achieve more expansive remedies, and copyright infringers, or people who provide circumvention devices, might truly be worried. As it stands, there does not appear any great disincentive to stop infringement or circumvention and to encourage users to buy authorised versions of these games.

## What happened

Nintendo commenced proceedings against two Defendants, Playables Limited and Wai Dat Chan, on two grounds: that the Defendants circumvented Nintendo's copy protection devices; and infringed Nintendo's copyright.

The Defendants imported and dealt with the R4 device which, when connected to a Nintendo DS game machine, could itself have a micro SD card inserted containing illegal downloads of Nintendo games.

The first limb of the claim regarding circumvention of copy protection was covered by sections 296 and 296 ZD of the Copyright Designs and Patents Act 1988 (UK) (Act).

## Section 296

Section 296 of the Act deals with the technical measures applied to copyright works in computer programs. It says:

(1) This section applies where— (a) a technical device has been applied to a computer program; and (b) a person (A) knowing or having reason to believe that it will be used to make infringing copies— (i) manufactures for sale or hire, imports,

1 *Nintendo Co Ltd and Nintendo of Europe GmbH v Playables Ltd and Wai Dat Chan* [2010] EWHC 1932 (Ch).

2 [2004] EWHC 1738 (Ch).

distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire or has in his possession for commercial purposes any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of the technical device; or (ii) publishes information intended to enable or assist persons to remove or circumvent the technical device ....

### *The Defendants, in essence, raised the defence that they did not know of or had no reason to believe that the devices would be used to make infringing copies.*

Under section 296 of the Act Nintendo had to prove that there was:

- (a) a "technical device" which had been applied to a computer program,
- (b) that the Defendants had manufactured, imported, distributed, sold, etc,
- (c) the sole purpose of which was to facilitate the unauthorised removal or circumvention of a technical device, and
- (d) knew or had reason to believe it would be used to make infringing copies.

Nintendo's case was relatively straight forward. The Defendants, in essence, raised the defence that they did not know of or had no reason to believe that the devices would be used to make infringing copies. This "it ain't me Guv" defence was at the heart of the case. The parties were asking the Judge to determine whether or not a device which could be used legitimately and also illegitimately was acceptable. The Judge disagreed with the Defendants and said:

I do not think that the Defendants have a realistic prospect of asserting that they did not know of the unlawful uses to which the devices would be put.

The Judge held that the Defendants' actions in selling the device were contrary to section 296.

#### **Section 296ZD**

Section 296ZD of the Act deals with the technical measures applied to copyright works other than computer programs. It says:

(1) This section applies where— (a) effective technological measures have been applied to a copyright work other than a computer program; and (b) a person ... (C) manufactures, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or has in his possession for commercial purposes any device, product or component, or provides services which— (i) are promoted, advertised or marketed for the purpose of the circumvention of, or (ii) have only a limited commercially significant purpose or use other than to circumvent, or (iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, those measures ...

Under section 296ZD, Nintendo needed to prove that:

- (a) there were technological measures, that had been applied to a copyright work and that they are effective (**ETM**); and

- (b) the Defendants manufactured, imported, distributed, sold, etc, a device product or component which circumvented the ETM, has little other purpose or use other than to circumvent the ETM, or is primarily designed to circumvent the ETM.

Previous cases have established that this section of the Act creates strict liability.<sup>3</sup> Notwithstanding this, the Defendants argued that they did not know or had any reason to believe that their devices would be used to make infringing copies and, in any event, argued there are lawful uses for the devices outside of downloading illegal games. They argued that players might make their own games and use this technology as a way to play them. Once again, Justice Floyd disagreed and said the defences did not have any "realistic prospect of success".

#### **Ordinary Copyright**

The second limb of Nintendo's case was a claim of copyright infringement. Nintendo asserted that the source code was an original computer program (a literary work according to the Act) and the NLDF<sup>4</sup> was either in a literary work or an original artistic work and these were both infringed. Nintendo did not claim that the Defendants directly infringed its copyright, but rather that they authorised others (for people who bought these devices) to infringe Nintendo's copyright. Nintendo, however, only won on the NLDF authorisation point with the Judge calling the devices "templates for infringement".

#### **Expanded Jurisdiction**

The Defendants were not only selling their devices within the UK but exporting them as well.

Justice Floyd said that section 296ZD is concerned with dealings in the UK in devices **capable of** circumvention, distinguishing it from the device **actually being used** in the UK for circumvention. On that basis he departed from the earlier decision of Sony v Ball and granted Nintendo summary judgment on export sales as well as sales within the UK. This meant Nintendo had the basis for a greater damages calculation. In this Justice Floyd expanded the existing law.

#### **So What?**

So what does all this mean? Well, not much really, although it did for Nintendo. The fact that Nintendo went to the trouble to fully prosecute aspects of a case which had been partially settled suggests it had a point to prove and it was certainly successful in doing that.

It is unlikely that it will have a detrimental impact on the trade in illegal devices except, of course, for those based in the United Kingdom who fall under the jurisdiction of the English Courts and who have sales at a level that could attract the attention of the gaming companies.

For the rest of us it will just provide interesting fodder for debating the old issue of gaming companies wanting to protect their investment in intellectual property and those who, for whatever reason, disagree with that.

**Brett Farrell is an associate at Barlow Robbins LLP**

<sup>3</sup> Sony Computer Entertainment Inc. v Ball & Ors [2004] EWHC 1738 (Ch).

<sup>4</sup> The NLDF is the Nintendo Logo Data File. This file enables Nintendo to prevent circumvention of its technical security measures by preventing unlawful games copies from loading or playing.

# Journalist Shield Laws

Commonwealth legislation protecting journalists has been in place since 2007. New South Wales is the only state that has enacted shield laws but they do not offer the same level of protection as the Commonwealth laws. In this article, Matthew Tracey suggests that the shield offered by both legislative regimes is inferior in comparison to the United Kingdom and New Zealand and that the level of protection afforded to journalists' sources could be significantly strengthened by the incorporation of a presumption in favour of non-disclosure. At the time of publication, Liberal Senator and Shadow Attorney-General, George Brandis, has introduced a private members bill to the Senate in line with legislation in New Zealand which represents stronger protection for journalists. Independent Senators Xenophon and Wilkie are expected to introduce similar legislation that will attract the support of the ALP.

## Introduction

This article has four sections. First, it will identify the legal and ethical obligations of journalists in Australia in relation to the confidentiality of sources and will trace the development of shield laws over the last twenty years. Second, it will analyse the future of shield laws in Australia. Third, it will discuss the strength of the current provisions in adapting to changes in the media landscape and the role of the journalist. Finally, this paper will examine the approaches taken by The United Kingdom, New Zealand and the United States. The main focus of this paper will be the legislative environment in Australia as it relates to journalists. However, brief attention will be given to the operation of the common law in relevant states and territories.

## Journalists' obligations

In both New South Wales and the Commonwealth, journalists' disclosures in court are governed by a legislative regime.<sup>1</sup> All other Australian states and territories are subject to the common law. The current laws apply only to proceedings in New South Wales and Commonwealth courts (including an ACT court). In addition, investigations undertaken by regulatory bodies such as anti-corruption agencies could operate outside the provisions of the Evidence Acts and therefore journalists would not receive the benefit of their protection.

Despite the undertakings given to sources by journalists, the common law has consistently confirmed that such undertakings cannot "stand in the way of the imperative necessity of revealing truth in the witness box."<sup>2</sup> This point was developed in *John Fairfax & Sons Ltd v Cojuangco*<sup>3</sup> where the High Court held that a journalist should not be compelled to disclose the identity of a source, unless disclosure is required in the interests of justice.<sup>4</sup>

Journalists have ethical standards in addition to, but not in replacement of, their legal obligations. The Media Entertainment and Arts Alliance (MEAA) Code of Ethics states that when confidences are accepted by journalists they should be respected in all circumstances.<sup>5</sup> Disclosing the identity of a source is the clear point of tension between the legal and ethical obligations of a journalist.

Journalists may feel that their reputation would be damaged if they identify a source to which they have given an undertaking of confidentiality. It is not inconceivable that journalists may feel a stronger allegiance to the Code of Ethics than the law. Despite clear warnings that legal obligations take precedence over allegiance to the Code of Ethics, implementing this in practice can be highly problematic.<sup>6</sup>

A clear illustration is *R v Gerard Thomas McManus & Michael Harvey (McManus)* where journalists Michael Harvey and Gerald McManus were each fined \$7000 for contempt of court after refusing to reveal the source of a confidential communication.<sup>8</sup> Penalties for contempt of court can include a fines and custodial sentences. Most custodial sentences for contempt of court in relation to journalists have been no more than fourteen days in length.<sup>9</sup>

Detaining journalists can appear to have mixed results. Rozenes J has stated that specific reference to punishments needs resonance with the defendant. His Honour outlined how a fine may not be a sufficient deterrent compared to a custodial sentence.<sup>10</sup> Interestingly however, it has been suggested that some journalists have enjoyed a bolstered reputation because of their willingness to be found guilty of contempt of court in order to maintain their silence.<sup>11</sup>

Most legislation recognises that a free press entrenches the public's interest in being informed of important matters.<sup>12</sup> The test in most jurisdictions requires the court to balance this interest with the public

1 Evidence Act 1995 (Cth) Div 1A; Evidence Act 1995 (NSW) Div 1A.

2 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102 as per Dixon J.

3 (1998) 165 CLR 346.

4 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 354.

5 Media Entertainment and Arts Alliance Code of Ethics, Article 3.

6 Independent Commission Against Corruption v Cornwall (1995) NSWLR 27 as per Abadee J at 238.

7 [2007] VCC 619.

8 *Ibid.*

9 *DPP v. Luders*, unreported, District Court of WA No. 177 of 1990, Tony Barrass, seven days; *Copley v Queensland Newspapers Pty Ltd* (unreported) Queensland Supreme Court, 20 March 1992, Gerard Budd, six days; *State Bank of South Australia v Hellaby* (unreported) Supreme Court of South Australia, 4 September. 1992, No 1627 of 1992, David Hellaby, fourteen days.

10 *R v Gerard Thomas McManus & Michael Harvey* [2007] VCC 619 at 44 quoting *Independent Commission Against Corruption v Cornwall* (No 2) (Unreported, Supreme Court of NSW, no 11043 or 1993, 8 September 1993) as per Abadee J.

11 Transcript, Tony Barrass in the Law Report, ABC Radio, 18 July 2006, accessed on 1 September 2010 at <http://www.abc.net.au/rn/lawreport/stories/2006/1687921.htm>.

12 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth), Explanatory Memorandum; Evidence Amendment (Journalists' Privilege) Bill 2007 (Cth), Explanatory Memorandum.

interest in the administration of justice. The potential protection for each jurisdiction is entrenched within that jurisdiction's Evidence Act. Therefore, the source of protection will depend on the particular legislation under which the action is commenced.

### History

The Senate Standing Committee on Legal and Constitutional Affairs first considered the need for journalists' shield laws in 1993.<sup>13</sup> After examining the equivalent provisions in the United Kingdom and New Zealand, the Committee's final recommendation was for State and Commonwealth Evidence Acts to be amended to include a qualified privilege that could be overridden at the court's discretion.<sup>14</sup> Interestingly, the Committee advocated for a presumption in favour of non-disclosure.

### New South Wales

In 1997, protections for those people in a professional relationship against disclosure of certain information were inserted into the Evidence Act 1995 (NSW) (**NSW Act**). The presumption is that the source should be disclosed unless the potential harm to the source outweighs the desirability of the evidence being adduced.<sup>15</sup>

These amendments received Royal Assent on 31 March 1998. The provisions apply to all proceedings in New South Wales courts.<sup>16</sup> Brereton J correctly categorised the operation of the section not as one that created a privilege upon certain communications, but rather one that "confers on the court a discretion by which it may direct that evidence of a confidential communication not be adduced."<sup>17</sup>

In 2002 these provisions were tested where the National Roads and Motorists Association sought the identity of a source who supplied information to a journalist. The source was thought to be a director and as such, would be in breach of fiduciary duties owed to the Association and its members. Master Macready stated that the privilege for professional relationships did cover journalists.<sup>18</sup> Ultimately, the interests in allowing the NRMA to pursue an action against the source was found by the court to outweigh any likely harm to the source.<sup>19</sup>

### Commonwealth

As a result of both the decision in *McManus*<sup>20</sup> and the Australian Law Reform Commission report entitled *Uniform Evidence Law* tabled on 8 February 2006, then Attorney-General Philip Ruddock introduced amendments to the Evidence Act 1995 (Cth) (**Commonwealth Act**) that were modelled on the NSW Act. However, the striking difference was that the Commonwealth provisions related only to journalists. The balancing test remained the same, however issues of national security were to be "afforded the greatest possible weight".<sup>21</sup>

These amendments received Royal Assent on 28 June 2007. The Commonwealth Act applies only to proceedings in a federal court or

a court of the Australian Capital Territory.<sup>22</sup> As yet, there have been no instances in the Commonwealth jurisdiction where a journalist has relied on section 126B of the Commonwealth Act.

On 19 March 2009, the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) (**2009 Bill**) was introduced to the House of Representatives. Several changes were proposed but a presumption in favour of disclosure remained.

An objects section was to be inserted by the 2009 Bill that would inform the exercise of judicial discretion. That object was to achieve a balance between the public interest in the administration of justice and the public interest in the communication of facts to the public.<sup>23</sup> The likely harm to the journalist that may be caused by disclosure was added as a matter the court could consider.<sup>24</sup> According to the Explanatory Memorandum, harm could encompass damage to the journalist's professional reputation and the ability to access sources of

## *Disclosing the identity of a source is the clear point of tension between the legal and ethical obligations of a journalist.*

fact in the future.<sup>25</sup>

The court would be able to exercise its discretion despite the communication occurring through an unlawful act. Many disclosures to journalists are unlawful acts especially if the source is employed in the public sector. This point was raised by Australian Associated Press when the 2009 amendments were under review by the Senate Committee on Legal and Constitutional Affairs.<sup>26</sup>

The amendments attempted to fine tune the factors the court could assess by removing the reference to 'greatest weight' in relation to national security. Western Australia Director of Public Prosecutions, Robert Cock QC, questioned how "the reputation of one journalist could ever be more significant than the genuine security interests of a nation?"<sup>27</sup> The amendments placed the consideration of national security interests on par with other considerations that needed to be weighed up by the courts. It allows the court to apportion the appropriate gravity to each competing consideration. The magnitude of factors that could conceivably form part of national security is immense. By applying an artificial acceleration in the courtroom, issues of national security could unnecessarily distort the operation of the discretion.

In Committee, the most common objection to the proposed amendments was the retention of a presumption in favour of disclosure.<sup>28</sup> The Committee received submissions from many industry bodies

13 Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, *Off the Record - Shield Laws for Journalists' Confidential Sources*, 1993.

14 *Ibid.*

15 Evidence Act 1995 (NSW) s126B(3).

16 Evidence Act 1995 (NSW) s4.

17 *Director-General, Dept of Community Services v D* [2006] NSWSC 827 as per Brereton J at [23].

18 *NRMA v John Fairfax Publications* [2002] NSWSC 563 at para 5.

19 *Ibid.*

20 The Hon Philip Ruddock, MP, News Release, 201/2005, 'Submissions Lodged in Journalist Contempt Case,' 4 November 2005.

21 Evidence Act 1995 (Cth) s126B(4).

22 Evidence Act 1995 (Cth) s4.

23 Bills Digest, Parliamentary Library, Evidence Amendment (Journalists' Privilege) Bill 2009, p4, 11 May 2009 no 130 2008-2009.

24 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth).

25 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth), Explanatory Memorandum, para 6.

26 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (Australian Associated Press), Submission 4, 2.

27 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (WA Director of Public Prosecutions), Submission 11, 4.

28 Final Report of Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (WA Director of Public Prosecutions), see comments by Liberal Senators, Greens Senator and Independent Senator Nick Xenophon.

29 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, Dr Joseph Fernandez, submission no 1; Media Entertainments and Arts Alliance, submission no 7; Australian Press Council, submission no 3; Australian Associated Press, submission no 4; Public Interest Advocacy Centre, submission 5; Rae Desmond Jones, submission no 12, as referred to in Majority Report.

that supported the introduction of a presumption in favour of non-disclosure.<sup>29</sup>

Young J commented that the 2009 amendments were “doubtful to make very much practical difference” given the limited number of journalists that have faced a custodial sentence.<sup>30</sup> Regardless of the actual number of journalists being imprisoned for contempt of court, the MEAA was quick to emphasise that in 2008 at least five Perth

## ***Legislation has been proposed that would include a presumption in favour of non-disclosure in line with other jurisdictions such as New Zealand and the United Kingdom.***

journalists were threatened with three years jail and fines of \$60,000 in the past 10 months.<sup>31</sup>

### **Western Australia**

Recently the Western Australia Attorney-General, Christian Porter, proposed to enact shield laws. Limited information has been made available, however two outcomes are likely. First, a rebuttable presumption in favour of disclosure will exist. Second, communications will not be protected when made in furtherance of a fraud, criminal offence or an act attracting a civil penalty.<sup>32</sup> The proposed amendments would be very similar to the position outlined by the Standing Committee of Attorneys-General in July 2007. Specifically, the NSW Act was the preferred model and acceptable to insert into the Model Uniform Evidence Bill.<sup>33</sup>

### **Near future**

Following the proroguing of the Federal Parliament on 19 July 2010, the 2009 Bill lapsed without being put to a vote. There were reports in the media that although the Bill was introduced to the Senate in mid-2009, its delay and eventual lapse was due to negative feedback from various stakeholders.<sup>34</sup>

Changes to journalist shield laws were raised by Commonwealth Shadow Attorney-General, George Brandis, during the Attorneys-General Debate on 13 August 2010. Senator Brandis proposed amendments to the Commonwealth Act that would include a presumption in favour of non-disclosure in line with other jurisdictions such as New Zealand, the United Kingdom and potentially the United States.<sup>35</sup> Amendments to the Commonwealth Act were introduced to the Senate on 29 September 2010. The legislation contains two major implications for journalists in courts exercising the Common-

wealth jurisdiction. First, the introduction of a rebuttable presumption in favour of journalists mirroring the wording of section 68 of the Evidence Act 2006 (New Zealand). Second, expanding the protection offered under the Commonwealth Act to all professional relationships as opposed to just journalists. This would have the effect of providing similar protection for relationships of a professional nature across both New South Wales and the Commonwealth.

Independent Senators Andrew Wilkie and Nick Xenophon have announced plans to introduce shield laws containing a presumption in favour of non-disclosure similar to the bill moved by Senator Brandis.<sup>36</sup> At the same time, Victorian Attorney-General, Rob Hulls, has proposed similar shield laws to cover Victoria. Rob Hulls has publicly stated that he hasn't ruled out “going it alone”<sup>37</sup> if attempts by the independents fail. A spokesman for Federal Attorney-General Robert McLelland said shield laws should be uniform across the states.<sup>38</sup>

New South Wales Coalition legal affairs spokesman, Greg Smith, has received draft legislation containing a rebuttable presumption in favour of non-disclosure from Senator Brandis in order to propose amendments to the state law through a private members bill. It has been suggested that the legislation contains a provision identical to section 68(2) of the Evidence Act 2006 (NZ).<sup>39</sup> This would provide for a presumption in favour of non-disclosure unless a party can convince the court that on balance, the public interest in disclosing the source outweighs any likely adverse effect on any person and the public interest in the communication of facts and the ability of the news media to access sources of facts.<sup>40</sup>

Mr Smith has announced that if the current New South Wales government chose to reject his proposed laws then he would reintroduce the legislation if the state Coalition won government.<sup>41</sup>

### **The new journalist**

The increasing role that bloggers and other new media entities play in the communication of facts to the public cannot be ignored. As such, a proper definition of ‘journalist’ is an important issue.

In the current Commonwealth Act, ‘journalist’ is not defined. In their most recent report, the Senate Committee discussed how ‘journalist’ should be defined if it were to be included in the amended Act. The foreseeable problem for the Committee was whether or not the ambit of the legislation would be wide enough to cover bloggers and other new media entities. Despite the suggested definitions on offer,<sup>42</sup> the Committee resolved to leave the court to decide whether a particular scenario fits within the ambit of the privilege.<sup>43</sup>

Amendments proposed by Senator Brandis incorporate a definition of journalist as found in the New Zealand legislation meaning:

a person who in the normal course of that person's work may

30 Current Issues, Australian Law Journal (2009) 83 ALJ 359 a5 359.

31 Media Entertainment and Arts Alliance, Media Release, accessed on 28 August 2010 at [http://www.alliance.org.au/documents/080310pr\\_washeildlaws.pdf](http://www.alliance.org.au/documents/080310pr_washeildlaws.pdf).

32 Letter from Media Entertainment and Arts Alliance to Western Australian Attorney-General Christian Porter accessed on 3 September 2010 at [http://www.alliance.org.au/documents/meaa\\_response.pdf](http://www.alliance.org.au/documents/meaa_response.pdf).

33 Standing Committee of Attorneys-General, Summary of Decisions, July 2007 4(b)(e) accessed on 4 September 2010 at [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/2010\\_MAY\\_Summary\\_of\\_OOS\\_Decisions.pdf/\\$file/2010\\_MAY\\_Summary\\_of\\_OOS\\_Decisions.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/2010_MAY_Summary_of_OOS_Decisions.pdf/$file/2010_MAY_Summary_of_OOS_Decisions.pdf).

34 Chris Merritt, The Australian, Coalition promise to introduce shield laws prompts labor to re-examine its position, 20 August 2010.

35 Attorneys-General Debate Transcript, accessed on 6 September 2010 at <http://www.alp.org.au/federal-government/news/transcript--robert-mccllelland,-debate,-sydney/>

36 Chris Merritt, The Australian, Protection for reporters' sources tops Andrew Wilkie agenda, 13 September 2010.

37 David Rood, The Age, A-G pushes for shield laws to protect journalists, 13 September 2010.

38 Ibid.

39 Chris Merritt, The Australian, Uniform shield laws coming for the big three jurisdictions, 24 September 2010.

40 Evidence Act 2006 (NZ) s68(2).

41 Chris Merritt, The Australian, Uniform shield laws coming for the big three jurisdictions, 24 September 2010.

42 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (5, 10, 23, 32).

43 This is consistent with the 1993 report of the Senate Standing Committee on Legal and Constitutional Affairs: Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, 1993, Off the record: shield laws for journalists' confidential sources, para 2.29.

44 Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) Sch 1.

be given information by an informant in the expectation that the information may be published in a news medium.<sup>44</sup>

News medium, for the purposes of the Bill, means a medium for the dissemination to the public of news and observations on news which could easily incorporate blogs and other new media. The question for courts is whether or not the particular person was acting as a journalist in the normal course of their work.

The court must consider the increasing importance of non-traditional publishers in the contemporary media landscape. For example, there may be instances where professional journalists as defined by their employment status and publishing history would be obligated to disclose if they were acting outside their professional capacity at the time. Alternatively, bloggers performing the same service to the public as that of a journalist should not be unworthy of protection simply because they may be receiving remuneration through non-traditional models such as website traffic advertising revenue. Recently, the state of Washington in the United States has introduced a state-based shield law that explicitly includes internet based communications in defining a journalist.<sup>45</sup>

## International

### New Zealand

Shield laws in New Zealand are contained in the Evidence Act 2006 (NZ) (**NZ Act**).<sup>46</sup> Under the NZ Act, the party seeking disclosure must convince the court that, on balance, the public interest in disclosing the source outweighs any likely adverse effect on any person and the public interest in the communication of facts and the ability of the news media to access sources of facts. This was designed to "give greater confidence to a source that his or her identity would not be revealed."<sup>47</sup> A similar approach in Australia would bolster any potential source's confidence that their identity would remain secret.

The NZ Act contains an implicit acknowledgment that the disclosure of confidential communications in court may have an effect on the ability of the news media to access sources of facts.<sup>48</sup> This is in stark contrast to Australian state courts where any connection between disclosure and ability to access sources is seldom recognised.<sup>49</sup> The High Court recognised an alternative view in *John Fairfax & Sons Ltd v Cojuangco*<sup>50</sup> in accepting that confidentiality had a role in encouraging sources to come forward.<sup>51</sup>

### United Kingdom

The United Kingdom position under the Contempt of Court Act (**UK Act**) requires the party seeking disclosure to convince the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime.<sup>52</sup> The UK Act exists in concert with Article 10 of the European Convention of the Protection of Human Rights and Fundamental Freedoms as was considered in *X Ltd v Morgan Grampian Ltd*.<sup>53</sup> The case involved a journalist who refused to disclose his source in relation to an article regarding a confidential corporate plan. The journalist was found in contempt of court and subsequently appealed to the European Court of Human Rights.<sup>54</sup> The

Court found that the order to reveal the source was in contravention of the journalists' rights under Article 10 of the Convention which guarantees freedom of expression.

### United States of America

The First Amendment to the United States Constitution provides the basis for many claims to protect journalists from disclosure of their sources. This Amendment declares that Congress shall make no law abridging freedom of speech, or of the press.<sup>55</sup> The Amendment was not used in relation to journalist sources until *Branzburg v Hayes*.<sup>56</sup> According to Senator Russ Feingold in his statement to the United States Senate Committee on the Judiciary, "forty-nine states and the District of Columbia have already adopted some form of reporter's

*If a journalist has ethical obligations and occupational pressures to keep the identity of a source confidential, it follows that the law should recognise these factors.*

shield, either by statute or court decision."<sup>57</sup> In the thirty-eight years that have passed since *Branzburg v Hayes*,<sup>58</sup> the United States still does not have a federal shield law protecting journalists.

The Free Flow of Information Act was introduced to the United States Congress on 13 February 2009. It has been introduced to the United States Congress several times and was reported on by the Committee on 10 December 2009. If it passes, it will contain special protection for bloggers and freelance journalists and hold a presumption in favour of non-disclosure similar to New Zealand and the United Kingdom.

## Conclusion

Shifting the presumption in favour of non-disclosure does not limit the court's ability to ascertain the identity of a source. This is because the underlying balancing test remains the same regardless of which party has the burden of convincing the court. If a journalist has ethical obligations and occupational pressures to keep the identity of a source confidential, it follows that the law should recognise these factors. This is not to suggest that the law should bend to serve these obligations, rather that the law should assist the free flow of information to the public. It can serve this end while simultaneously ensuring that the public interest in the administration of justice is recognised.

The future of legislative change in the Federal sphere is becoming increasingly clear. The rejection of the proposed amendments in 2009 by Liberal and Independent Senators and media industry groups has signalled a new era of recognising the importance of shield laws to the effective operation of a free press. Whether or not a new legislative environment could prevent another case similar to *Harvey and McManus* will be a matter for the future.

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45 Revised Code of Washington, Title 5 Evidence, Ch 5.68 (United States of America).

46 Evidence Act 2006 (NZ) s68.

47 New Zealand Law Commission, Evidence, Report 55 Vol 1, Reform of the Law (1999) at paragraph 302.

48 Evidence Act 2006 (NZ) s68(2).

49 *Arthur Christopher Nicholls v DPP for the State of South Australia* (1993) 61 SASR 31 at 48 as per Perry J; *R v Gerard Thomas McManus & Michael Harvey* [2007] VCC 619.

50 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 354.

51 *Ibid.*

52 Contempt of Court Act 1981 (United Kingdom) s10.

53 *X Ltd v Morgan Grampian Ltd* [1991] 1 AC 1.

54 *Goodwin v the United Kingdom* [1996] ECHR 16.

55 Constitution (United States) Amendment 1.

56 *Branzburg v Hayes* 408 US 665 (United States).

57 Senator Russ Feingold in his statement to the United States Senate Committee on the Judiciary, November 19 2009, Senate Judiciary Committee 'Executive Business Meeting' Thursday November 19 2009.

58 *Branzburg v Hayes* 408 US 665 (United States).

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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.

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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.

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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:

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