

## Cloudy Day for Copyright Control: The 'Optus TV Now' Case and the Battle Between Content Protection and Innovation

Tureia Sample provides an overview of the background, legal issues and implications for participants in the media industry arising out of the recent Federal Court decision in *Optus v NRL & Ors*.<sup>1</sup>

The recent first-instance decision in the Optus TV Now litigation has attracted much attention. The case is an Australian first for cloud technology and the 'private and domestic' time-shifting exception to copyright infringement for broadcasts under section 111 of the *Copyright Act 1968* (Cth) (the **Copyright Act**). At the heart of the dispute is the tension between encouraging innovation on the one hand and protecting existing copyright investments on the other.

Although the AFL and the NRL matches were the focus of protection in this litigation, the implications of the case extend further afield. The dispute is entering uncharted territory for broadcasting in Australia and will affect all Australian free-to-air television (and radio) programming, not just sports events. It will also have considerable impact on negotiations for media rights fees, growth of digital media and the interpretation of copyright law.

At first instance, Justice Rares decided in favour of Optus.<sup>2</sup> But with the AFL, NRL and Telstra promptly lodging an appeal on 10 February 2012 and intense lobbying underway in Canberra, the controversy is far from over.

### Optus TV Now service

The Optus TV Now service is a cloud-based subscription service which allows users to record free-to-air television programs (including AFL and NRL matches) and replay them back on a compatible device (namely PCs, Apple devices, Android devices and 3G devices).

To make a recording, users navigate an electronic program guide to select programs and then click the 'record' button. Optus' complex recording system then makes four copies of each broadcast for every user request. These are then stored in Optus' NAS (network attached storage) computer at its data centre (aka 'in the cloud') for up to 30 days.

When requested by a user, the selected programs are streamed to the user's enabled devices. It is important to note that, contrary to some media reports, the content is *streamed* to the customer and not *downloaded* (which is relevant to the copyright claims in the litigation).

Up to 45 minutes of programming can be stored for free (although all subscribers must first have an Optus Zoo account). Alternatively, subscribers can pay \$6.99 for 5 hours or \$9.99 for 20 hours of storage per month.

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

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

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## What is all the fuss about?

Consumers across the globe have been making personal recordings of free-to-air television programs on their personal video recorders (**PVRs**), and prior to that video cassette recorders (**VCRs**), for decades. In Australia, live free-to-air television can already be watched via mobiles under the retransmission scheme<sup>3</sup> with Optus Zoo, Telstra and Vodafone Hutchison. So some may ask, what is all the fuss about?

Certainly Optus' position is that the Optus TV Now service is a legitimate personal recording service which is no different to a PVR. Moreover, the Optus TV Now service only permits temporary copies to be streamed which is arguably less offensive to rights-holders than permanent copies being downloaded.

But to others in the industry, the Optus TV Now service is going just that bit further. The service is available on a mobile device whereas many established PVRs are predominantly still physically tied to the home. In addition, under the retransmission scheme (whereby Optus, Telstra and Vodafone Hutchinson retransmit live and unaltered free-to-air television programs to mobiles), at least the underlying rights-holders in the television programs receive *some* remuneration.

In some countries home taping is remunerated (eg by statutory licences or a levy).<sup>4</sup> In contrast, the operation of the Optus TV Now service in Australia does not return any revenue to the copyright owners. Moreover, for practical reasons the mobile retransmission scheme is limited to only the national signals of the ABC and SBS main channels. This makes Optus TV Now more attractive because it offers mobile access to all Australian free-to-air channels including the digital multi-channels.

Further, more than just a recording device, the Optus TV Now service is virtually live. On certain devices, programs can be replayed just two minutes after the live free-to-air broadcast commences. Even the use of the word *Now* in the marketed brand 'Optus TV Now' portrays an appealing flavour of immediacy.

From the AFL and NRL's perspective, Optus is making money from their intellectual property without paying any rights fees as well as threatening the exclusivity of internet and mobile rights deals.

## The litigation

On 26 August 2011 Optus boldly initiated proceedings under section 202 of the Copyright Act, seeking protection against copyright infringement notices from the AFL and NRL. The litigation then exploded into a landmark test case involving major players in the communications, sports, media and legal industries and four complex copyright claims (see timeline of proceedings at the end of this article).

The AFL, NRL and Telstra then filed a cross-claim, alleging that Optus infringed the copyright in the broadcasts and films of the AFL matches and NRL matches by making cinematograph films (that is, recordings) of the broadcasts of the matches without a licence. They further alleged that Optus 'communicated' the recordings 'to the public' when such recordings were streamed to users' compatible devices for viewing.

In its defence, Optus said that no licence was required because the copies were made by Optus subscribers, not Optus, under the section 111 time-shifting exception. In Optus' view, it is merely trading in functionality and cloud storage services, not the copyright content itself.

<sup>3</sup> *Copyright Act 1968* (Cth), Part VC.

<sup>4</sup> For example, in the United States the *Audio Home Recording Act* of 1992 has established a levy on blank tapes and an exemption for home taping. A similar scheme was attempted by the Australian government but declared constitutionally invalid by the High Court in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

Screenrights (an Australian non-profit company that collects audio-visual licence fees for rebroadcasting TV programs including via mobiles) also sought to make an *amicus curiae* submission in relation to the retransmission scheme. Leave was denied by Justice Rares but Screenrights are open to make another submission in the appellate proceedings.

## Justice Rares' judgment

The hearing was set down for four days in December 2011 but was dealt with in two. Seven principal legal issues were agreed which essentially relate to three questions.

1. Did the user or Optus 'make' the recordings (or copies) of the broadcast?<sup>5</sup>
2. If it was the user, did those recordings (or copies) fall within the time-shifting exception of sections 111(1) and (2) of the Copyright Act?
3. When the recorded program was streamed to the user for later viewing, did Optus or the user 'communicate' such recording to 'the public'?<sup>6</sup>

On 1 February 2012, Justice Rares found in Optus' favour on all three questions.

### *Who made the recording?*

On the first issue, Justice Rares found that it was the user who made each recording when the user clicked the 'record' button on their compatible device. He found that because individuals had to program each recording and because Optus only made individual copies for customers if a request was received, it was the individual user and not Optus that were making the copies.

Justice Rares noted that section 111 is technology neutral and does not require the user to have any particular relationship (such as ownership) to the recording equipment. He described the Optus TV Now service as 'simplicity itself'<sup>7</sup> and 'apparently easier for a user to employ than some of the technologies available ... such as a DVD recorder, DVR (digital video recorder) or VCR'.<sup>8</sup>

Importantly, despite Optus providing substantial technology for the recording process (including picking up the free-to-air broadcast in MPEG-2 form; recording it in four formats; storing it on Optus' NAS computer; and then streaming the recording), Justice Rares held that the process was no different to a person using other more traditional equipment such as a VCR or DVR. He relied on cases such as *Moorhouse*,<sup>9</sup> the US case of *Cartoon Network*<sup>10</sup> and the Singaporean case of *Record TV*<sup>11</sup> in this regard.

This logic can be questioned. For example, traditional DVRs are usually pieces of hardware located in the home which are more directly controlled by the consumer. In comparison, Optus TV Now is a sophisticated recording process 'in the cloud' which is almost entirely managed by Optus' infrastructure and not familiar to most customers.

It is this very point that is being appealed to the Full Federal Court on the basis that Justice Rares erred by 'finding that the service that Optus TV now offers the user is substantially no different from a VCR or DVR'.<sup>12</sup>

### *Were the recordings made within the time-shifting exception?*

Justice Rares found that the user's recordings were within the time-shifting exception; the user made the recordings solely for their private and domestic use for watching the program at a more convenient time. He confirmed that section 111 does not stipulate any minimum time requirement for what will be 'more convenient' and that it is a subjective decision depending on the circumstances of the viewer. Justice Rares explained that a user may stop viewing to make a cup of tea or finish a task at work in order to watch a program at a more convenient time, even if that was 'near live' and within minutes of the start of the broadcast. Weight was given by his Honour to the legislative intent of section 111 and the operation of the Optus terms and conditions on this point, as discussed below.

## The dispute is entering uncharted territory for broadcasting in Australia and will affect all Australian free-to-air television (and radio) programming, not just sports events.

### *Was the recording 'communicated to the public'?*

Finally, on the third question, Justice Rares also found in Optus' favour. His Honour said that the user was responsible for electronically transmitting, or making available online, the program recording because it was the user that initiated streaming the program back to its compatible device by clicking the 'play' button. Optus, it was held, merely enabled the user to make such choices and to give effect to them. Justice Rares considered the principles of *iiNet*<sup>13</sup> closely on this issue.

Justice Rares further held that such users of the TV Now service were not 'the public' because the communication is only made by the person who made the recording. His Honour also noted that the communication lacked any commercial detriment to the rights-holders (particularly in comparison to that caused in *Telstra v APRA*<sup>14</sup>). His Honour followed *Cartoon Network*<sup>15</sup> and *Record TV*<sup>16</sup> in this regard and distinguished the recent UK case of *ITV v TV Catchup*.<sup>17</sup>

### *Was the digital file an 'article' distributed for trade?*

A separate issue was raised by the NRL alone, namely that the digital file comprising the streamed NRL footage was an 'article or thing' and that it was distributed for the purpose of trade.<sup>18</sup> Justice Rares briefly dealt with the claim, dismissing it on the basis that section 111 applies to the user, not Optus, and that no infringement occurred.

5 Within the meaning of the *Copyright Act 1968* (Cth), sections 86(a), 87(a) and 87(b).

6 Within the meaning of the *Copyright Act 1968* (Cth), sections 10(1), 22(6), 22(6A), 86(c) and 87(c).

7 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012) [21].

8 *Ibid* [22].

9 *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

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

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

12 Australian Football League, 'Notice of Appeal', *Australian Football League v Singtel Optus Pty Ltd*, NSD206/2012, 10 February 2012.

13 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285. However, note that this decision is subject to appeal: Transcript of Proceedings, *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCATrans 210 (12 August 2011).

14 *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140.

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

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

17 *ITV Broadcasting Ltd v TV Catchup Ltd (No 2)* [2011] FSR 40.

18 Within the meaning of the *Copyright Act 1968* (Cth), sections 103 and 111(3)(d).

### Policy choice

Justice Rares' judgment was peppered with policy references to the 'realities of modern life' and the development of ordinary private and domestic copying over the decades as a result of advances in technology.<sup>19</sup> Interestingly, Justice Rares acknowledged the overarching policy considerations by stating:

this question resembles the old conundrum of which came first: the chicken or the egg? Different courts confronted by a similar dilemma to that presented here have approached it by recognising that identification of a policy choice may be a key to construing whether an infringement of copyright has occurred.<sup>20</sup>

Clearly Justice Rares was well aware of, and sensitive to, underlying policy issues and did not want to stymie innovation nor find against parliamentary intention to facilitate public access to broadcast content.

## If Justice Rares' decision is upheld on appeal, the case will have a major impact on the negotiation of media rights fees.

### Legislative intent

In his judgment, Justice Rares also gave considerable weight to the history and legislative intent of the section 111 time-shifting exception.<sup>21</sup> He was influenced by the Explanatory Memorandum and statements that the 2006 amendments were intended to 'restore credibility to the [Copyright] Act',<sup>22</sup> 'accommodate the development of technologies and the ordinary ways in which individuals can avail themselves of them'<sup>23</sup> and that the private and domestic time-shifting practices would have 'negligible market impact'.<sup>24</sup> Importantly, Justice Rares also acknowledged that section 111 had been amended to extend 'private and domestic use' to mean 'on or off domestic premises' (emphasis added) which extends application of the exception to remote devices such as mobiles.<sup>25</sup>

This analysis all played in favour of Optus.

### Optus terms & conditions

In addition, Justice Rares noted that Optus informed users that a recording could only be made for private and domestic use.<sup>26</sup> Optus informed users in a number of ways, including carefully constructing the service terms and conditions by including conditions such as:

- It is a breach of copyright to make a copy of a broadcast other than to record it for your private and domestic use.

- Optus TV Now is for your individual and personal use.

The success of Optus with this line of argument is a reminder of the importance of underlying contract conditions.

### Legal framework

The Optus TV Now proceedings were initiated by Optus just days after receiving cease and desist letters from the AFL and NRL. Some may have been surprised by the speed and confidence of this preemptive strike. But when viewed in the context of the legal framework behind this litigation, and how carefully Optus designed its terms and conditions and technological infrastructure supporting the service, it appears that Optus was thoroughly prepared for the dispute.

The setting for the dispute was the introduction in 2006 of the private time-shifting exception under section 111 of the Copyright Act. This exception provides that copyright is not infringed if:

a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.<sup>27</sup>

The time-shifting exception was introduced as part of the Australia-US Free Trade Agreement reforms to bring Australian copyright law more in line with United States law. In Parliament, the stated intention was to broaden the previous 'home taping' exception which was of little practical benefit as it was effectively limited to *live-to-air* broadcasts.<sup>28</sup>

Unsurprisingly, Optus firmly supported the introduction of the exception and foreshadowed the Optus TV Now service in its 2005 submission when it stated:

When Optus starts offering digital subscription broadcast services, we plan to make personal digital recorders (PDRs) available that will connect to our network so users can record television programs for viewing at a more convenient time ... These PDRs will offer greater viewing choice and convenience while also fairly extending the availability of the material without undermining the copyright owners rights ... Optus would welcome these changes.<sup>29</sup>

In addition to this legislation, there are two strands of case law which support the legal framework behind the Optus TV Now service. The first confirms the proposition that there is no inherent copyright in a sporting event or spectacle: see *Victoria Park Racing*,<sup>30</sup> *Motorola*,<sup>31</sup> *Telstra v PMG*<sup>32</sup> and most recently in the UK the *FAPL* case.<sup>33</sup> The second category of cases, which was directly relevant to the issues before the Court, reflect an international trend (particularly in the US and Singapore) of innovation overriding copyright protection, such

19 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012). See, eg, [74], [76].

20 *Ibid* [62].

21 *Ibid* [53]–[57].

22 *Ibid* [55].

23 *Ibid* [84].

24 *Ibid* [55].

25 *Ibid* [8].

26 *Ibid* [72], [75].

27 *Copyright Act 1968* (Cth), section 111(1).

28 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 96 [6.1].

29 Optus, Submission to Attorney General's Department, *Review of Fair Use and Other Copyright Exemptions*, 6 July 2005, 2.

30 *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479.

31 *National Basketball Association v Motorola, Inc*, 105 F 3d 841 (2<sup>nd</sup> Cir, 1997).

32 *Telstra Corporation Limited v Premier Media Group Pty Ltd* (2007) 72 IPR 89.

33 *Football Association Premier League Ltd v QC Leisure* [2012] FSR 1.



as *Sony v Universal*,<sup>34</sup> *IceTV*,<sup>35</sup> *Capitol Records*,<sup>36</sup> *Cartoon Network*,<sup>37</sup> *ITV v TV Catchup*<sup>38</sup> and *Record TV*.<sup>39</sup>

#### Record TV

The Singaporean case of *Record TV* warrants further mention for a number of reasons. First, Optus, owned by Singaporean company SingTel, would have been well aware of the favourable *Record TV* decision in preparing the Optus TV Now service and anticipating the litigation. Second, not only did the case feature in Justice Rares' decision — it involved similar legal and technical issues to the Optus TV Now service — but the Singaporean time-shifting provision was based upon and is identical to the Australian provision.<sup>40</sup>

The *Record TV* litigation was between MediaCorp (Singapore's largest broadcaster) and a company called Record TV. The dispute related to Record TV's internet-based digital video recorder service which allows registered users to record free-to-air TV programs. Similar to the Optus TV Now service, the Record TV service is essentially a time-shifting service which streams recordings of programs to a registered user's computer for up to 15 days. The issues for the Singaporean court were identical to the issues raised in the Federal Court of Australia: whether Record TV had infringed MediaCorp's rights to (a) make copies of; (b) communicate to the public; and/or (c) authorise the copying and/or communication to the public of those copyrighted shows.

After losing in the High Court, Record TV ultimately prevailed in the Singapore Court of Appeal in 2010. In a comprehensive win, Record TV was held not to be liable for any of (a), (b) and (c) above. The policy objective behind the Court's reasoning in *Record TV* is summed up by Rajah J when he said:

This appeal raises an important policy issue as to how the courts should interpret copyright legislation in the light of technological advances which have clear legitimate and beneficial uses for the public, but which may be circumscribed or stymied by expansive claims of existing copyright owners.<sup>41</sup>

This pro-public benefit approach in *Record TV* resonates with the approach taken in *IceTV*<sup>42</sup> and informed Justice Rares' decision in favour of Optus.

## Potential impact

### Media rights revenue

If Justice Rares' decision is upheld on appeal, the case will have a major impact on the negotiation of media rights fees. The fact that Optus can get access to and make free-to-air content available without paying for it will arguably diminish the value of exclusive internet and mobile rights.

And when content buyers either withdraw or refuse to pay premiums for exclusivity, the impact is felt the hardest by the content sources: the producers, the big studios, and in the case of sports events, the sporting codes. For the sporting codes, media rights revenue is now

the single most important revenue source (surpassing other revenue such as sponsorship and entry fees) so an ultimate win for Optus will severely threaten their revenue streams.

This potential drop in digital rights fees also means that the content owners will be forced to 'think outside the box' to generate new forms of revenue which are not reliant on traditional broadcast fees.

## No doubt developers have been keenly watching the litigation and wondering if the green light would be given to such digital devices which exploit the broadcast copyright exception.

Moreover, it is likely that the devaluing of mobile and internet rights will lead to an increase in 'bundled' rights deals. That is, buyers of content will demand platform neutrality and seek to licence numerous media rights in the one package (eg television, internet and mobile rights) so as to remain the exclusive 'home' of such content.

### Digital media products

The Federal Court's endorsement of Optus' monetisation of the time-shifting exception will also open the flood gates for new digital devices and business models based on the time-shifting copyright exception.<sup>43</sup>

The explosion of innovation following successful court cases has already been seen in the US. For example, following on from cases such as *Cartoon Network*<sup>44</sup> (where the US Court found that TV content stored in the cloud through remote personal video recorder functionality did not breach copyright) it has been observed that the successful outcome of the case had a significant positive impact on venture capital investment in cloud computing in the US.<sup>45</sup> Further, on 14 February 2012, a new cloud DVR service called 'Aereo' was launched in New York. This service allows users (for US\$12 per month) to stream free-to-air broadcast content to a user's computer, laptop, iPad or Apple-TV and (based on the US decisions of *Sony*<sup>46</sup> and *Cartoon Network*<sup>47</sup>) store recordings of these programs 'in the cloud'.

Already the uptake of digital media is exploding and consumers have access to personalised digital products such as FOXTEL iQ, T-Box, TiVo, Play TV, GoogleTV, myTVR and EyeTV. In 2011, Amazon, Google and Apple each unveiled 'cloud' music services.

And now that Optus has pioneered the cloud-based TV Now service in Australia there are sure to be more to follow. No doubt developers have been keenly watching the litigation and wondering if the green light would be given to such digital devices which exploit the broadcast copyright exception. So far, the answer is summed by Optus' post-decision marketing campaign for Optus TV Now: 'Yes, it's possible'.<sup>48</sup>

34 *Sony Corp. of America v Universal City Studios, Inc*, 464 US 417 (1984).

35 *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458.

36 *Capitol Records, Inc v MP3Tunes, LLC*, No. 07 Civ. 9931 (SDNY, 2011).

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

38 *ITV Broadcasting Ltd v TV Catchup Ltd (No 2)* [2011] FSR 40.

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

40 Copyright Act (Singapore, cap 63, 2006 rev ed) s 114.

41 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830, 833.

42 *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458.

43 It should be noted that the section 111 time-shifting exception only applies to *broadcasts*, and does not extend, for example, to musical works or other digital content.

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

45 Observation by US academic Josh Lerner in his study 'The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies' (2011) <[http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner\\_Fall2011\\_Copyright\\_Policy\\_VC\\_Investments.pdf](http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf)>.

46 *Sony Corp. of America v Universal City Studios, Inc*, 464 US 417 (1984).

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

48 For example, this campaign was displayed in a full page spread in MX News on 6 February 2012, page 32.

## Copyright law

Of course, for the time being, Justice Rares decision has also clarified certain provisions of the Copyright Act. Subject to further appeal, the time-shifting exception will extend to complicated cloud-based recording services, and viewing after even a short delay of a few minutes and before the program has finished is also acceptable as a 'more convenient time'.

In addition, on the complex issue of whether there had been a communication to the public, Justice Rares confirmed that even though the Optus TV Now service relied on sophisticated infrastructure operated by Optus, it was the individual user who was responsible for the communication, and that such users were not 'the public'. Interestingly, Justice Rares also touched upon the existing anomaly in the Copyright Act whereby a person can satisfy a defence of making a copy within an exception but at the same time be caught under another exercise of copyright such as 'communicate to the public' for that same activity.<sup>49</sup> On this issue Justice Rares noted that:

it would be anomalous if the communication to the maker of the recording for the protected purpose for which he or she made it was an infringement of copyright.<sup>50</sup>

Finally, it would have been useful if Justice Rares had considered the vexed issue of 'authorisation' (which was raised by the statements of cross-claim). Given the streamlined approach to proceedings (in light of the imminent 2012 football season) it may not have been addressed because a primary infringement by the users was not established, however other similar cases (which also did not establish primary infringement) have considered this issue.<sup>51</sup>

## Where to from here?

The controversy is far from over as the parties prepare for the appellate hearing in the Full Federal Court on 14 and 15 March 2012.

Moreover, there are other issues from the initial hearing which the parties agreed would be decided later (including whether Optus infringes copyright because the Apple QuickTime Streaming makes temporary copies of the programs). As such, whether Optus has established its claim of unjustifiable threats under section 202 of the Copyright Act cannot be determined fully until this QuickTime issue is also resolved.

For some, Justice Rares' decision was the correct policy outcome for consumers, innovation and legislative intent. Certainly, artificially curbing the growth of cloud computing and consumer desires to access content anywhere anytime would not be common sense. But did Justice Rares extend the private and domestic time-shifting exception too far? *Questions can be asked about the analogy the Court drew with traditional recording devices, as well as the somewhat unsatisfactory analysis given to the complicated issue of whether there had been a communication to the public.*

Given the complexities of the legal and technological issues involved and the wide-reaching ramifications for the media industry (including the sporting codes, broadcasters, telecommunications companies, digital device developers and consumers) it is likely that the dispute will be taken all the way to the High Court. Even then, with 2012 heralding the final report from the mighty Convergence Review and the ALRC review into the operation of copyright exceptions in the digital environment, potential changes to the legislation also mean that the clouds have not fully cleared for Optus.

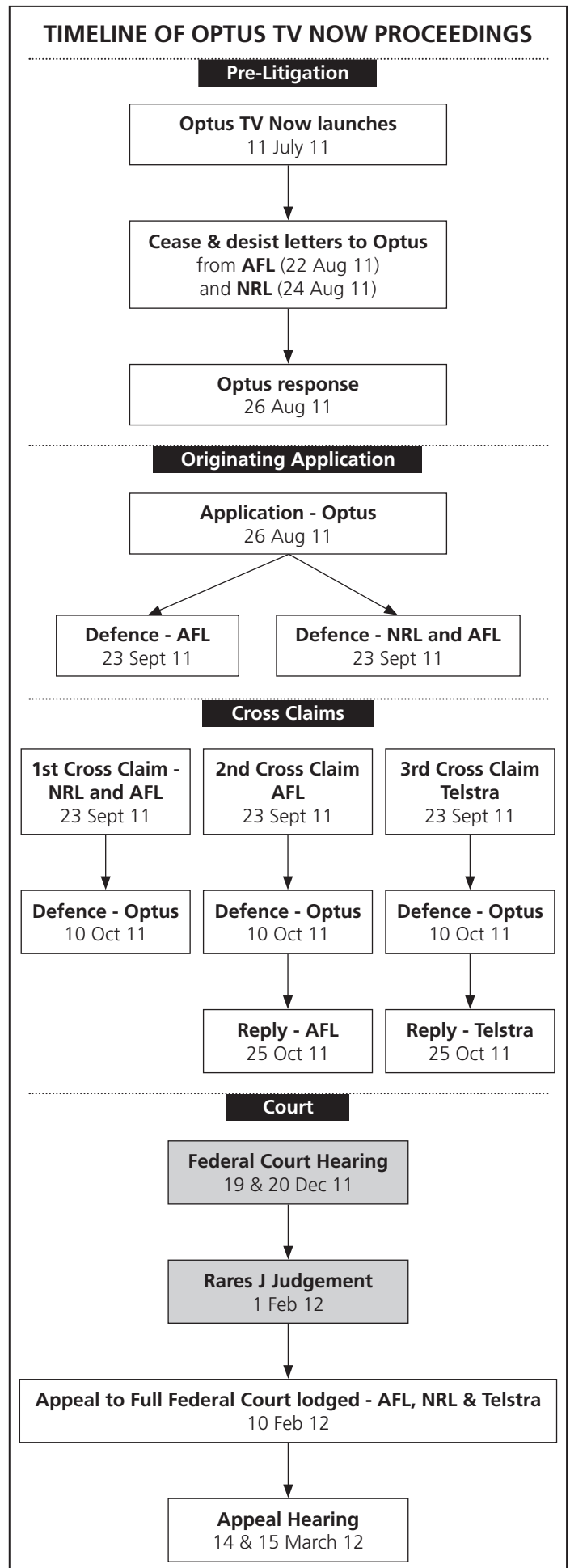
Watch this space!

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49 For example, a person may make a copy of a film which infringes section 86(a) which is then protected under the section 111 time-shifting exception, but separately be liable for a communication to the public under section 86(c) for that same activity.

50 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012) [105].

51 For example, *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.



# Convergence Review: An Ambitious Agenda for Overdue Reforms

Kate Jordan and Toby Ryston-Pratt take a look at the Convergence Review Committee's Interim Report, its implications for the media and communications industry and make some observations about the current recommendations, including proposed changes to media ownership laws.

'Convergence' continues to be the buzz word in the media and communications industry in particular following the release of the Convergence Review Committee's Interim Report in December 2011.<sup>1</sup> While the Interim Report provides some insight into the likely tone and content of the Final Report due in March 2012, key details are still lacking and it is too early to say what impact the Convergence Review will have on the shape of Australia's media and communications market.

## Background

The Convergence Review was established by Senator Conroy in December 2010 to examine the policy and regulatory frameworks governing the converged media and communications sectors in Australia. The objectives of the review are noble. The regulatory framework that applies to the Australian media and communications market is badly outdated. Overly complex legislation is in need of substantial simplification and consolidation.

The key question coming out of the Interim Report is whether the Government will be able to implement any of the ambitious agenda outlined in the Interim Report prior to the next Federal election. With the National Broadband Network the number one communications issue on the policy agenda (and likely to remain so given its prominence in the political debate), it seems unlikely that we will see significant legislative change any time soon.

In practice, this means media and communications companies are likely to have to continue to work within the existing regulatory framework for some time to come. Rapid technological change will only place increasing pressure on the regulatory boundaries.

The strain placed on the regulatory regime by converging technologies is clearly highlighted by issues arising in the delivery of sports content. The recent TV Now case between Optus and the NRL (see the previous article in this edition for more details) effectively allows mobile carriers to stream television content on their mobile devices without a grant of rights. Other examples exist that have not had the same publicity. Sony's PSP has permitted similar functionality to the Optus TV Now service for some time. This summer with the Cricket Live iPad application installed on your iPad you can watch subscription cricket content directly on your Apple TV without the need for a Foxtel subscription.

These examples defy the historical industry structures that have been replicated in regulation and contracts and raise questions such as: Is this content being delivered by television, mobile or internet? When content can be so simply shifted from one device to another, how can it be regulated?

These issues demonstrate the ambitious task ahead of the Convergence Review Committee and ultimately the Government. It is clear that our existing regulations will continue to struggle to keep pace with technological change and will become increasingly irrelevant. However, a comprehensive revision of the laws like the one contemplated by the Interim Report would require considerable time and care.

The Interim Report is set to be followed by a final report in March 2012 that will also take into account the reports of the Independent Media Inquiry and Australian Law Reform Commission's review of the National Classification Scheme. What the Federal Government does with those reviews remains to be seen.

The Opposition's response to the report will also be significant given the minority Government and in light of a likely 2013 election.

## The regulatory framework that applies to the Australian media and communications market is badly outdated.

If the current Government is serious about making any significant changes arising out of the Convergence Review, it may be better placed confining its focus to more manageable elements such as the repeal of the clearly outdated statutory limitations on media ownership and control. It could then defer the more aspirational task of rewriting Australia's media and communications legislation until the National Broadband Network is a reality. These outdated statutory limitations are the statutory control rules and the 2 out 3 rule (which is one of the media diversity rules). A first phase could be to abolish these rules, but retain the current minimum number of voices rules. A subsequent phase or phases could look to implement some of the more ambitious and controversial aspects of the proposed reforms. Such an approach would be consistent with the Interim Report which contemplates the possibility of a gradual implementation of changes between now and 2015.

Given the operation of section 50 of the *Competition and Consumer Act 2010* (Cth) – which prohibits acquisitions which would have the effect of or likely to have the effect of substantially lessening competition in the relevant market – we would expect that the removal of the statutory control rules would be uncontroversial. The removal of the 2 out of 3 rule may be more controversial, but the simple fact is that this rule is completely out of date and diversity can be protected through the retention of the voices rules in their current form until the implementation of later phases of reform.

## Media ownership and control changes

The Interim Report recommends significant amendment of the current statutory control rules and media diversity rules.

In summary the Interim Report recommendations in this area are:

1. a new number of voices rule to replace the current voices rules being that there must be no less than:
  - 5 independent media groups in metropolitan radio licence areas; and
  - 4 independent media groups in regional radio licence areas.<sup>2</sup>

<sup>1</sup> See here: [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0007/143836/Convergence-Review-Interim-Report-web.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0007/143836/Convergence-Review-Interim-Report-web.pdf)

## Whilst a public interest test may give greater flexibility to a regulator it will also result in decreased certainty for the media sector.

The new rule would apply to changes in control involving the new and as yet undefined concept of 'Content Service Enterprises'.<sup>3</sup>

The Interim Report notes that a Content Service Enterprise would be determined by threshold criteria relating to the scale and nature of operations, and states that those criteria might include:

- the viewer/user/subscriber base meeting a threshold;
- the service originating in Australia or being intended for Australians;
- the provider having the ability to exercise control over the content; and
- the operating revenue or commercial scale of the enterprise meeting a threshold.<sup>4</sup>

What is proposed as the final criteria (including actual measurements) and what discretion the regulator will have remains to be seen, but will no doubt be contentious particularly if the thresholds are set low.

2. removal of the following statutory control rules:<sup>5</sup>
  - the 75% audience reach rule – a person must not be able to exercise control of commercial television licences where the combined licence area populations exceed 75% of the population of Australia;<sup>6</sup>
  - the '2 to a market rule' – a person must not be able to exercise control of more than two commercial radio broadcasting licences in the same radio licence area;<sup>7</sup> and

- the '1 to a market rule' – a person must not be able to exercise control of more than one commercial television licence in the same licence area.<sup>8</sup>
3. replacing the media diversity rule known as the '2 out of 3 rule' (where a person must not be in a position to exercise control of any more than 2 out of 3 of a commercial radio broadcasting licence, a commercial television licence and an associated newspaper in a radio licence area)<sup>9</sup> with a public interest test that examines influence at a national level.

The Interim Report contains very little detail about the proposed public interest test, other than that to note that such a test has been adopted in other jurisdictions including the United Kingdom<sup>10</sup> 'as a flexible way to assess the influence of different media in a converged environment' and to state that a public interest test 'would allow the regulator to better assess market concentration and diversity issues for mergers involving Content Service Enterprises that are significant at a national level'.<sup>11</sup>

Beyond these statements, how this public interest test will work, and how it will sit with competition assessment, has not been articulated. Whilst a public interest test may give greater flexibility to a regulator it will also result in decreased certainty for the media sector. This is demonstrated by the Sky / ITV case in the United Kingdom in which the Court of Appeal was critical of the fact the UK public interest provisions were open to conflicting interpretations and indicated that aspects of the legislation may need to be amended.<sup>12</sup>

### Other recommendations for change

Set out on page 9 is a high level overview of some of the other recommendations made in the Interim Report and some corresponding observations.

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2 Sections 61AG and 61AH of the *Broadcasting Services Act 1992* (Cth) (the **BSA**).

3 The Convergence Review Interim Report recommends that Content Service Enterprises also be subject to content standards and Australian content obligations.

4 The Convergence Review Interim Report, page 5.

5 The statutory control rules also apply to directorships. For example a person is prohibited from being a director of a company or companies that would be in a position to exercise control beyond the 75% audience reach.

6 Sections 53 and 55(1) and (2) of the BSA.

7 Sections 54 and 56 of the BSA.

8 Sections 53 and 55(3) and (4) of the BSA.

9 Sections 61AMA and 61AMB of the BSA.

10 The UK rules apply to a 'relevant merger situation' and a 'special merger situation' (See *Enterprise Act 2002* (UK) (the **Enterprise Act**), ss 23, 42 and 59).

A relevant merger situation focuses on turnover and market share. It exists where two or more enterprises 'cease to be distinct' and where either the value of the turnover of the enterprise exceeds £70 million or the merger would result in the creation or enhancement of at least a 25% share of the supply of goods or services of any description in the UK or a part of the UK (see s 23 of the Enterprise Act).

A special merger situation in the media context exists where:

- at least one-quarter of all the newspapers which were supplied in the UK, or in a substantial part of the UK, were supplied by the person or persons by whom one of the enterprises (merger parties) concerned was carried on; or
- at least one-quarter of all broadcasting of that description provided in the UK, or in a substantial part of the UK, was provided by the person or persons by whom one of the enterprises concerned was carried on (see s 59 of the Enterprise Act).

The public interest criteria differ depending on the class of merger situation and whether the enterprises in question are newspaper or broadcasting related, but include considerations such as:

- the need for accurate presentation of news and free expression of opinion in newspapers;
- the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or part of the UK;
- the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience; and
- the need for availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests.

11 The Convergence Review Interim Report, page 9.

12 *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907 at [123]. The Convergence Review Discussion Paper on Media Diversity, Competition and Market Structure also discussed this case: see [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0004/139270/Paper-2\\_Media-diversity\\_competition\\_access.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0004/139270/Paper-2_Media-diversity_competition_access.pdf), page 18.



Recommendation	Detail	Observations
<b>Establish a new, independent regulator</b>	New regulator for content and communications to have: <ul style="list-style-type: none"> <li>• broad rule making powers within government policy frameworks;</li> <li>• flexibility in application of regulations; and</li> <li>• powers to encourage media diversity and to deal with content-related competition issues, distinguished from and exercised in coordination with the general powers of the ACCC.</li> </ul>	The interplay between the new regulator and the ACMA, or whether the new regulator is a re-formulation of the ACMA is not clear. Details of how the new regulator's and the ACCC's functions will be split to be elaborated.
<b>Remove content licences</b>	Remove the precondition that content providers on some delivery platforms hold a licence in order to provide content. Specific communications content regulation will still be required to promote public interest outcomes, applied on a technology-neutral basis.	Reforms the outdated approach to regulation based on traditional media platforms (radio, television and newspaper). Details of the public interest regulation to be elaborated.
<b>Develop a common and consistent approach to the allocation and management of broadcasting and non-broadcasting spectrum</b>	Provide spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the BSA. Provide a market based pricing approach for the use of spectrum and greater transparency where spectrum is used for public policy reasons. Provide greater certainty for spectrum licence holders around licence renewal processes.	Details of the new market based approach to be elaborated beyond the replacement of the current broadcasting licence fee with charges that better reflect the value of the spectrum.
<b>Promote Australian content</b>	All Content Service Enterprises to meet Australian content requirements by either: <ul style="list-style-type: none"> <li>• committing a % of total program expenditure to Australian content; or</li> <li>• contributing to a converged content production fund.</li> </ul> Retain the 55% transmission quota for commercial free-to-air broadcasters for a transitional period and increase Australian content sub-quotas, with flexible application. Provide certain direct and indirect subsidies for premium television content produced in the independent sector and interactive content such as games and applications.	Australian content requirements will apply to a broader range of content providers.
<b>Promote local and community content</b>	Continue to apply minimum content requirements to free-to-air broadcasters with a more flexible compliance and reporting regime. Remove the trigger event rules currently in place for radio. Encourage content providers to explore new ways to deliver local content including on new delivery platforms. Continue to make spectrum available to community radio and provide digital channel capacity to existing community television services	The Interim Report flags that in the longer term other incentives may need to be developed to encourage local content distribution as more content is delivered outside spectrum based services.
<b>Reforms to Public Broadcasting</b>	Update the ABC and SBS Charters to expressly refer to the range of existing services undertaken including online activities. Apply Australian content requirements to the public broadcasters. Provide digital television channel capacity to the National Indigenous Television Service.	The Interim Report flags that in the longer term other incentives may need to be developed to encourage local content distribution as more content is delivered outside spectrum based services.
<b>Content Standards</b>	Any new regulatory framework for content standards should reflect the individual rights of adult Australians to read, hear, see and produce content of their choosing within the law, with appropriate protections against offensive content. Content standards should reflect the importance of fairness, accuracy and ethical behaviour in news, opinion and current affairs.	The Interim Report acknowledges that other reviews are examining this topic and is therefore brief in its treatment of it.

## Next steps

The Convergence Review Committee is scheduled to provide its final report to the Government in March 2012, after which time both the Government and the Opposition can be expected to respond, although the timing of any such response is unknown.

The final report will reflect findings of the Independent Media Inquiry and the Australian Law Reform Commission's review of the National Classification Scheme, both due to report to Government on 28 February 2012.

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***Kate and Toby also thank Anna Haynes a solicitor at Clayton Utz for her assistance in preparing this article.***

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

# Holding Back the Tide: King Canute Orders and Internet Publications

Sophie Dawson and Paul Karp consider the treatment and utility of King Canute orders and their implications for internet publishers.

## 1. Introduction

The internet poses new challenges for the law of sub judice contempt. Contempt is a common law crime that is committed when material is published which has a real and definite tendency, as a matter of practical reality, to prejudice proceedings.<sup>1</sup> Accepted examples of material which may constitute contempt include publication of prior convictions of, and serious allegations against, a person who is facing trial or against whom proceedings are pending.

### articles which have been published on the internet in circumstances in which they did not pose any contempt risk later do give rise to such risk due to intervening events

In contrast to other media, internet publications can easily be accessed long after their initial publication date, cannot be adjusted for different jurisdictions, and can be uploaded and accessed by anyone anywhere in the world. This means that articles which have been published on the internet in circumstances in which they did not pose any contempt risk (for example, because they relate to crimes for which no arrest has been made), later do give rise to such risk due to intervening events (such as the arrest and charge of a suspect). The global nature of this medium means that traditional means of managing contempt risk, including paring back publications for the jurisdiction in which a case is to be tried (and from which the jury will be drawn) are not available.

In recent years, New South Wales and Victorian Courts have faced those challenges in cases in which take down orders have been sought in relation to material which it was alleged might prejudice jury members if they were to see them. Such applications reflect the ongoing and easily accessible nature of internet publications. They are not ordinarily made in relation to publications in print or by way of TV or radio, because such publications are not generally as easy to access after their initial publication or broadcast.

Those courts took different approaches when assessing the risk posed by non-current internet publications which could only be found by searching. The Victorian Court of Appeal in *Mokbel*<sup>2</sup> took the approach that the risk posed by such publications was not sufficient to warrant a take down order, whereas the in *Perish*<sup>3</sup> deci-

sion in the New South Wales Supreme Court, Price J made take down orders in relation to such material.

These differing decisions reflect differing assessments of the extent to which jurors need to be protected from potentially prejudicial publications. They also reflect differing assessments of the utility of take down orders, which have been referred to as 'King Canute' orders, on the basis that requiring reputable media to take down publications does not prevent publication of, or access to, other publications available on the internet control of which may be beyond the jurisdiction of the Court. The apparent futility of attempting to hold back the tide of publications has been likened to King Canute's order to the sea to stop the rising tide.

These decisions are significant for internet publishers when considering how to manage contempt risk for continuing publications. The *Mokbel* case, in particular, provides guidance on the issue of when and where publication occurs for the purpose of the law of contempt. The approach taken is quite different to the approach taken for defamation by the High Court in *Gutnick*.<sup>4</sup> The decisions together also highlight that the application of the law of contempt is a developing area in relation to which there will be a degree of uncertainty until there is more case law, particularly at an appellate level.

## 2. Jurisdiction for issuing take-down orders

The *Mokbel* and *Perish* decisions each relate to applications for take down orders. Both courts confirmed that superior courts have an inherent jurisdiction to make such orders in suitable cases as part of their inherent jurisdiction to control the criminal process and protect the fundamental right of the citizen to a fair trial.<sup>5</sup> In NSW, Section 23 of the *Supreme Court Act 1970* confirms that inherent jurisdiction<sup>6</sup> which is to do 'what is necessary for the administration of justice'.<sup>7</sup> Necessary does not have the meaning of essential, but is 'subjected to the touchstone of reasonableness'.<sup>8</sup> So the jurisdiction may be stated as 'no wider than what is reasonably necessary to secure the object of ensuring that justice is done'.<sup>9</sup>

The apparent futility of attempting to hold back the tide of publications has been likened to King Canute's order to the sea to stop the rising tide.

1 See, eg. *Victoria v Australian Building Construction employees and Builders Labourers Federation* (1982) 152 CLR 25.

2 *News Digital Media Pty Ltd and Fairfax Digital Ltd v Antonios Sajih Mokbel and DPP* [2010] VSCA 51

3 *R v Perish* [2011] NSWSC 1102

4 *Dow Jones & Co Pty Ltd v Gutnick* (2002) 210 CLR 575

5 See, eg. *Jago v The District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292

6 *John Fairfax Publications Pty Ltd v District Court of New South Wales*, 353

7 *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264, 270

8 *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 452

9 Above n1, [42]

## the application of the law of contempt is a developing area in relation to which there will be a degree of uncertainty until there is more case law

As noted above, such orders have not traditionally been sought. One reason for that is that traditional media is more fleeting in the sense that it is more difficult to go to the library for a back copy of a newspaper, or to find a recording of a broadcast than it is to search for a non-current internet article.

Two further reasons that suppression orders as well as take down orders for contempt are (or should be) relatively rare were noted by Warren CJ and Byrne AJA in *Mokbel*. First, it is 'the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act (and contempt of court is a criminal or quasi-criminal act) unless the penalties available under the criminal law have proved to be inadequate to deter commission of the offences'.<sup>10</sup> Second, the Court must give appropriate weight to countervailing public interests. Their Honours noted that two different competing public interests may come into play. In the *Mokbel* case, the relevant competing interest was the public's 'right to know' the matters in the articles in question. Their honours noted if (which was not the case) the articles had been reports of criminal proceedings, then the public interest in open justice would have also been in question. They noted that the principle of open justice is an important one, and that there is an 'interesting question' as to the ambit of the inherent power of the court to restrain publication of a fair and accurate report of a criminal proceeding for the purpose of protecting its process in that or another proceeding.<sup>11</sup>

### 3. Where and when is internet material published?

In *Mokbel*, the Court considered the question of when and where material is 'published' for the purpose of contempt. This is important because contempt is a strict liability crime which is committed by way of publishing material which gives rise to the requisite risk of prejudice.

The Court found that the test for when and where material is 'published' is different for contempt than it is for defamation. The High Court held in the *Gutnick* case that in defamation proceedings, internet material is 'published' each time it is read or viewed or listened to, and that publication occurs in the place of each person who accesses it.<sup>11</sup> In *Mokbel*, it was held that in relation to contempt where 'the concern is the risk to the legal process' publication occurs when and where the material is made available to a juror or potential juror 'whether it be shown that the person accessed it or not'. Warren CJ and Byrne CJ explained that this fits in with existing principles. They said:

Contempt occurs when the court process is exposed to risk, irrespective of whether the risk becomes actuality. This is consistent with the approach of the Court to allegations of contempt by publication of prejudicial material in the print or radio media. In such a case, the prosecution case does not depend upon proof that a juror

or potential juror actually read or heard the prejudicial material; it is sufficient that, as at the time of publication, the publication, assessed objectively, has a real and definite tendency to prejudice or embarrass the particular proceeding.

This is important because it means that material uploaded in one jurisdiction may be in contempt of court in another. The case of *R v Nationwide News Pty Ltd*<sup>12</sup> confirmed that the criminal law proscribes conduct within the jurisdiction but is not intended to affect criminal acts outside, so NSW and Queensland publications in that case did not constitute contempt of court in Victoria. This reasoning will not readily apply in relation to internet publications assuming *Mokbel* is followed.

The test for the timing of publication is also important because it means in effect that a person may be in contempt if they fail to take down an internet publication which gives rise to the requisite risk of prejudice even if it did not pose any risk of prejudice when first uploaded.

### 4. When will an internet publication pose sufficient risk to be in contempt?

The central issues in both *Mokbel* and *Perish* were whether it was necessary to make an order to protect the administration of justice, and whether an order would lack utility. The Courts reached different conclusions on those issues in the particular circumstances they faced.

The courts in both cases found that it should be assumed that juries will follow directions not to make enquiries (and to decide cases only on the evidence before them). They also both found that this does not mean that 'the law should abandon its traditional role of protecting them from events which put this integrity to the test.'<sup>1314</sup>

It is important to note that there are also relevant offences in some Australian jurisdictions. For example, section 68C(1) of the *Jury Act* 1977 (NSW) prohibits jurors making an inquiry for the purpose of obtaining information about the accused or matters relevant to the trial, and section 68C(5)(b) defines making an inquiry as including 'conducting research, for example by searching an electronic database for information (such as by using the Internet)'.

Warren CJ and Byrne AJA found that, in view of these protections, a take down order was not relevantly 'necessary' in relation to non-current material. Their honours said:

We respectfully doubt the necessity for making that part of the order requiring the applicants take down the material from their website provided the articles, the subject of the order, were no longer sufficiently current or were not presented in

## The Court found that the test for when and where material is 'published' is different for contempt than it is for defamation.

<sup>10</sup> Ibid, [49], citing *A-G v Random House Group Ltd* [2009] EWHC 1727, [28] citing in turn the judgment of Lord Donaldson MR in *P v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370.

<sup>11</sup> *Dow Jones & Co Pty Ltd v Gutnick* (2002) 210 CLR 575, 606 [44]. Note that the choice of law consequences of this finding have now been altered in the uniform Defamation Acts.

<sup>12</sup> [2008] VSC 526

<sup>13</sup> Above n2, [73]

<sup>14</sup> Above n1, [54]-[55]

<sup>15</sup> Ibid

## it should be assumed that juries will follow directions not to make enquiries (and to decide cases only on the evidence before them)

such a way as to be forced upon a visitor to the site who was not searching for them.<sup>15</sup>

Their honours noted that this approach is consistent with the approach traditionally taken to libraries. They noted that it has never been suggested that suppression orders should be made to libraries in relation to potentially prejudicial material, and identified the fundamental reason for this as 'that the information is available only for those persons who actually search for it.'<sup>16</sup>

Price J considered these findings in *Perish*. However, his honour found that there was a sufficient risk of prejudice in the case before him on the basis that jurors may come into contact with people who have accessed the internet and read these articles, and this would be a source of prejudice.<sup>17</sup> His honour distinguished *Mokbel* on the basis that the articles before him were much narrower and much more specific than those sought in *Mokbel*. Both cases do however relate to non-current articles containing potentially prejudicial material and in that respect are very similar.

Futility was also an issue in both cases. In *Mokbel* the court noted that if a juror did deliberately disobey directions, they would be able to access the same material from a cached website,<sup>18</sup> and indeed might access material from less reliable sites if mainstream media were the subject of take down orders, as more obscure publications would be given greater prominence in search results.<sup>19</sup> However, in *Perish* it was determined that 'the inability of a court to remove all offending material does not necessarily lead to a conclusion that the provision of the relief sought would be futile.'<sup>20</sup>

### 5. The perish direction to the registrar

In *Perish*, Price J also made a direction to the Registrar of the Court 'to contact and make representation to the search engines ... to block access to the articles in the cases of each of the accused'.

It is important for internet publishers (including search engines) to note that the effect of such notification may be to deprive them of the protection which they might otherwise have under clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth). Such protection is available only where an internet service provider or internet content host is not aware of the nature of relevant content.

### 6. Conclusion

Some people who refer to King Canute orders have in mind the futility of the orders he directed at the sea to stop the tide from rising and wetting his feet and person. Others have in mind that he made those orders for the purpose of demonstrating his lack of power to those who watched.<sup>21</sup>

Likewise, views will no doubt differ on the question of whether and to what extent Courts should make take down orders and suppression orders in relation to internet (and indeed other) publications in the face of the practical difficulties which now stand in the way of keeping information from any juror who seeks it.

Until the approach to those issues is finally settled, prudent internet publishers will have policies in place to minimise the contempt risk in relation to their non-current as well as their current publications.

***Sophie Dawson is a partner at Ashurst and Paul Karp assisted in preparing this article when he was a summer clerk in the IT, Communications & Media group at Ashurst. The views expressed in this article are the views of the authors only and do not represent the views of any organisation.***

**prudent internet publishers will have policies in place to minimise the contempt risk in relation to their non-current as well as their current publications**

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16 Above n2, [80].

17 Ibid, [31]

18 Above n2, [74]

19 Above n2, [94], [86]

20 Above n1, [44] 21 It seems appropriate to have an internet reference in this context: see, eg. the Wikipedia entry in relation to King Canute.



# Spectrum Management and the Future of the “Sixth Channel”

Sarah Strasser looks at the status of spectrum management in Australia, focusing on the future of the last unallocated channel of spectrum reserved for broadcasting purposes.

During 2010, Australian broadcasters SBS, Nine Network, and Seven Network conducted trials of 3D television broadcasting in seven locations across Australia. These trials, which tested production, transmission, and reception technologies, were reportedly the first non-subscription 3D television broadcast trials in the world.

To enable the trials to take place, the Australian Communications & Media Authority (ACMA)—the government regulator of radiofrequency spectrum—granted the broadcasters scientific apparatus licenses under section 100 of the *Radiocommunications Act 1992* (*Radiocommunications Act*). These temporary trial licences permitted limited use of radiofrequency spectrum designated for broadcasting purposes, otherwise known as broadcasting service band (BSB) spectrum.<sup>1</sup> The ACMA has allowed such trials for a range of purposes, including mobile television, digital radio, and datacasting—as well as the 3D television trials themselves.

**Once analog television broadcasting ceases in late 2013, only one 7 MHz “channel” of highly sought-after BSB spectrum will remain unassigned to a particular use on a long-term basis.**

The spectrum in which these trials operated is of particular interest because despite its value, it has not been permanently allocated to a specific use. Once analog television broadcasting ceases in late 2013, only one 7 MHz “channel” of highly sought-after BSB spectrum will remain unassigned to a particular use on a long-term basis. This piece of spectrum is commonly referred to as the “sixth channel”.

Community television licensees are currently using some of this spare capacity to broadcast digital services, but these licences are not guaranteed to continue after the end of 2013. This uncertainty is primarily due to the fact that the Government has not made any policy decisions on the use of the sixth channel following analog television switchoff.

A range of possible broadcasting-related uses for the sixth channel is considered below, in the context of the overall regulation of spectrum in Australia and the switch to digital television broadcasting.

## 1. Planning, licensing and allocation of spectrum

Before considering how the sixth channel might be used, it is first necessary to note technological and regulatory aspects of spectrum use in Australia.

Radiofrequency spectrum refers to that part of electromagnetic spectrum used to deliver various types of wireless technologies, including television and radio broadcasting, radar, WiFi, and mobile telephone

communications. Sections of radiofrequency spectrum are referred to as “bands”, within which 7 MHz “channels” are allocated.

Spectrum is a limited resource, and certain types are more valuable than others for particular uses. Not all spectrum is born equal - both the amount and location matter. Often only certain ranges of radiofrequencies are appropriate for particular purposes or types of devices. In some situations particular bands or channels may be useful for a number of applications, but for technological reasons it may not be possible to use the spectrum simultaneously for multiple purposes.

Mechanisms have been established in Australia to ensure that spectrum is managed to meet a number of aims, which include both efficiency and public good objectives that must be balanced. For example, while spectrum management must maximise the overall public benefit from using spectrum (by ensuring its efficient allocation and use), it must also encourage use that enables the provision of “a wide range of services of an adequate quality”.<sup>2</sup> Accordingly, rules exist to determine how to allocate valuable spectrum to competing users, and in certain situations to guard against interference between uses. While some of these rules establish that certain bands may be used only for certain general purposes (such as for broadcasting or by Government defence agencies), others require users to gain licenses, or at the very least to ensure compliance with technical requirements when operating devices that make use of spectrum.

### 1.1 Spectrum planning and the digital dividend

In Australia, spectrum is regulated through a number of tools such as spectrum plans, frequency band plans, and licence area plans, among others. At the highest level, the ACMA may prepare a spectrum plan, specifying the general purposes for which particular bands may be used.<sup>3</sup> In addition, the Minister may, within the structure created by the spectrum plan, designate particular parts of spectrum for broadcasting purposes.<sup>4</sup> In practice, ACMA decisions about spectrum allocation, licensing and pricing are informed by public consultation processes, which help to identify the nature of future demand.<sup>5</sup>

In Australia, a total of 57 channels, consisting of three bands in the VHF (Very High Frequency) range and two bands in the UHF (Ultra High Frequency) range, are currently designated to provide analog broadcast television.<sup>6</sup> To protect against interference between services, not all of these channels are used in every geographic location. Certain channels are used to provide services in one licence area, but remain unused in an adjoining licence area (where a different service is provided). The details of the geographic areas in which channels may be used are specified in the conditions of individual spectrum licences assigned to particular broadcasters.

Certain bands are more valuable for certain types of services than others. Lower frequency UHF bands are particularly valuable for hand-held devices such as mobile phones, as they have the superior

1 RA, s 31 (planning of broadcasting services bands).

2 RA, s 3 (objects of the Act).

3 RA, s 30 (spectrum plans).

4 RA, s 31 (planning of broadcasting services bands).

5 A Grant, “Spectrum management”, in A Grant & D Howarth (eds), *Australian Telecommunications Regulation*, 4<sup>th</sup> edn, CCH Australia, Sydney (2011), pp 327-328.

6 Further context is provided in Department of Broadband, Communications & the Digital Economy (DBCDE), *Digital Dividend Green Paper* (January 2010), (Digital Dividend Green Paper), p 7, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0005/125267/Digital\\_dividend\\_green\\_paper.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0005/125267/Digital_dividend_green_paper.pdf).

propagation characteristics of VHF bands but do not need large aerials. The Government has accordingly noted that “analog television spectrum in the UHF bands is ‘waterfront property’ because of its ability to carry signals over long distances, penetrate buildings and carry large amounts of data.”<sup>7</sup> This observation underpins the Government’s decision to reallocate UHF spectrum not needed for existing digital broadcasting services to other uses. This reallocated spectrum, which the ACMA intends to auction off in the public market in late 2012, is the “digital dividend”—126MHz in the 694-820 MHz band. The ACMA has planned for the reallocation of the digital dividend with the expectation that it will be purchased for mobile broadband, responding to an increased demand for spectrum for this purpose.

The sixth channel, which will make use of spectrum in two VHF bands, will not be part of the digital dividend, and will remain in the BSB. It will be the only unallocated 7 MHz channel designated for broadcasting and available at every transmission site in Australia, with coverage at least as good as that currently being delivered via analog television broadcasting.

## Commercial broadcasters are required to ensure that SDTV offerings achieve the “same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode”.

### 1.2 Licensing and allocation

Different licensing forms play a role in authorising particular uses of spectrum: spectrum licences, apparatus licences, and class licences.

Spectrum licences authorise the licensee sole use of a defined parcel of spectrum for up to 15 years (identified by a geographic location and frequency band), as long as the use complies with any licence conditions and technical frameworks for that particular radiofrequency band. Spectrum licences are used for mobile telecommunications, among other uses. Holders of such licences are guaranteed protection against interference from other spectrum users. Spectrum licences are granted via price-based allocation processes (auctions), and licensees have the right to trade their licence in whole or part. The digital dividend will be allocated via a spectrum licence auction process.

Apparatus licences are similar to spectrum licences in that they guarantee protection against interference, but differ in that they do not grant a quasi-property right in the spectrum itself. Instead, they typically involve a right to use a particular type of device within a defined portion of spectrum, subject to specified licence conditions. These licences are typically purchased for a fixed fee for up to five years, and may be renewed in some circumstances. Apparatus licences are used for a range of purposes, including broadcasting transmission, mobile telephony, and aeronautical applications. For example, broadcasters that wish to distribute television or radio programs via radiofrequency means must hold an apparatus licence authorising them to operate a radio-communications transmitter, in addition to an appropriate broadcasting service licence under the *Broadcasting Services Act 1992 (BSA)*.<sup>8</sup>

Class licences authorise users holding complying devices to operate within a particular band of spectrum, for example, devices such as garage door openers and WiFi devices. Class licences are not individual licences, but simply authorise the operation of complying devices within certain parameters. Persons operating devices under class licences are not guaranteed protection against interference.<sup>9</sup>

## 2. Why the switch to digital television and what it means

There are two primary benefits of adopting digital television technology and subsequently switching off analog television broadcasting services: improving broadcast and reception quality, and using spectrum more efficiently.

Australian commercial television broadcasters have been required to introduce digital television services, in preparation for switching off analog services. Until analog switchoff, the primary commercial and national services are being simulcast in both analog and digital formats. The first location in which analog television broadcasts stopped was Mildura, Victoria, in mid-2010. The rest of Australia has been progressively switching off analog services, to finish with major metropolitan areas at the end of 2013.<sup>10</sup>

### 2.1 Improving reception quality

Digital television technology is an improvement over analog in broadcast and reception quality. The basic level of digital television services—called Standard Definition (**SDTV**)—is of equal quality to what is offered by high quality analog or DVD formats. High Definition (**HDTV**) services provide higher quality picture and sound.<sup>11</sup> In Australia, both SDTV and HDTV services are broadcast using the technical standards of MPEG-2 and DVB-T.<sup>12</sup>

For the majority of viewers, digital television reception quality will be an improvement over analog. Analog television broadcast quality degrades gradually as distance from the point of transmission increases, resulting in an intermittent or fuzzy picture before the signal is too weak to generate any picture at all. In general the higher quality of digital broadcasts is the same throughout the reception area until at some point the signal is no longer received at all. Commercial broadcasters are required to ensure that SDTV offerings achieve the “same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode”.<sup>13</sup> Where viewers do not receive an adequate signal from a terrestrial digital television transmitter, they will be given access to digital television offerings via satellite.<sup>14</sup>

### 2.2 Using spectrum more efficiently

The switch from analog to digital television transmission technologies both enables broadcasters to offer a greater number of digital television services in less spectrum than is occupied by analog services, and creates vacant spectrum to be used for non-broadcasting purposes.

Not only do digital services require less spectrum than equivalent analog offerings, but their use of spectrum is more efficient. While analog television broadcasting technology requires the use of guardbands—interstitial and vacant channels—to protect against interference, digital television channels may be located directly adjacent to one another.

This characteristic means that multiple television broadcasting services may be provided within a single 7 MHz channel of spectrum.

7 Digital Dividend Green Paper, p iii.

8 This requirement applies to commercial, community, subscription and international broadcasters that wish to transmit programs by means other than satellite (or via fixed, non-radiofrequency networks). A different regime applies to national broadcasters. BSA, s 12(1) (broadcasting services licensing types); RA, Part 3.3 (licensing radiocommunications under apparatus licences).

9 ACMA website, “Spectrum licensing FAQs”, [http://www.acma.gov.au/WEB/STANDARD..PC/pc=PC\\_310839](http://www.acma.gov.au/WEB/STANDARD..PC/pc=PC_310839).

10 DBCDE, “Digital television switchover”, [http://www.dbcde.gov.au/television/digital\\_television\\_switchover](http://www.dbcde.gov.au/television/digital_television_switchover).

11 Federal Communications Commission, “The Digital TV Transition: What You Need to Know About Digital TV Sets”, <http://www.dtv.gov/needtoknow.html>.

12 MPEG-2 is a standard for the compression of video and audio information. DVB-T (Digital Video Broadcasting—Terrestrial) refers to a standard for digital terrestrial television broadcast transmission, which provides a means of transmitting compressed digital audio and video data.

13 BSA, Sch 4, cl 6(3) (setting out the terms of the conversion of commercial television from analog to digital).

14 BSA, Part 9C; ACMA, “The Viewer Access Satellite Television (VAST) service”, [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_312409](http://www.acma.gov.au/WEB/STANDARD/pc=PC_312409).

To date, commercial broadcasters have tended to provide one HDTV service and two SDTV services within their 7 MHz allocation, although national broadcaster ABC currently provides three SDTV services (one of which has limited hours) and one twenty-four hour news HDTV service. One reason for this variation is that different types of broadcasts have different spectrum requirements; action movies and sporting fixtures require relatively more spectrum than generally static news broadcasting, and 3D television requires more than standard HDTV formats.

After analog switchoff, the remaining digital television services will be consolidated into a contiguous block and relocated to new frequencies as necessary. This process of “restacking” will make the digital dividend available for reallocation. Without restack, digital television services would be scattered throughout the bands, making the use of any excess spectrum impractical. After the process is completed, all six channels reserved for broadcasting will be below UHF channel 51, and televisions will need to be retuned to be able to receive all services. While the ACMA plans to reallocate the digital dividend (700 MHz) band by auction in late 2012, it will not be available for use in any particular licence area until restack is completed there. The ACMA is currently developing restack channel planning proposals to guide that process.

Of the six channels remaining in the BSB post-restack, the Government has not yet indicated the intended long-term use of one channel. The decision of how the sixth channel should be allocated on a long-term and permanent basis is significant, as it is the last full channel available nationally that is reserved for broadcasting services.

### 3. The sixth channel and its possible uses

The debate over how any additional spectrum allocated to broadcasting may be used in a post-digital television switchover world has been active for over ten years, since the decision was made to plan for two spare digital channels. For a number of years, the focus was on the concept of datacasting,<sup>15</sup> which it was hoped would permit new entrants to television broadcasting while not undermining the limit of three commercial television stations per market. More recently, that issue has taken the form of a debate over the possible future of the sixth channel (with what would have been the “seventh” channel forming part of the digital dividend).

In January 2010, the government clarified the location and size of the digital dividend, noting that six channels would remain in the BSB.<sup>16</sup> Five of those channels were to be used by existing terrestrial broadcasters (three commercial and two national licensees). However, the future of the sixth channel was left unresolved.

A range of uses has been considered for the use of additional spectrum for broadcasting purposes.<sup>17</sup> The BSA does not oblige any particular use of the sixth channel, so long as BSB spectrum is used for broadcasting services of some description.

#### 3.1 Current use of the sixth channel

In addition to scientific trial purposes such as the 3D television trials, existing digital community television services in mainland metropolitan

locations are currently occupying the sixth channel. Since late 2009, three long-term community television services (in Sydney, Melbourne and Brisbane) and one trial community television service (in Adelaide), have been allocated apparatus licences allowing them to broadcast until the end of the simulcast period and analog switchoff. In addition, a trial community television service in Perth is authorised to commence transmission in digital mode only.<sup>18</sup>

While the three long-term community television services have been granted permanent broadcasting service licences, they do not have a statutory right to an accompanying apparatus licence beyond a certain date before restack. The trial community services currently have no right to broadcast post-switchover. If not allocated part of the sixth channel, these services will need to secure an alternative means to continue broadcasting, either via a subscription or online platform, or possibly by means of non-BSB spectrum.

### The decision of how the sixth channel should be allocated on a long-term and permanent basis is significant, as it is the last full channel available nationally that is reserved for broadcasting services.

#### 3.2 Expansion of traditional television broadcasting

One possible use of the sixth channel would be to reserve it for traditional television broadcasters, either by expanding the range of television broadcasting available or to reserve the spectrum for the rollout of new technologies.

Within this category, one possibility is the use of the channel for digital television broadcasting services: commercial, community, or national. For example, community television services could be allocated spectrum for use post-switchover, allowing them to continue broadcasting. Alternatively, the introduction of a fourth commercial network has been suggested.<sup>19</sup> While the BSA enables the Minister to allocate BSB licences to new commercial television broadcasting services, to date no such allocation has been made.<sup>20</sup>

Alternatively, the sixth channel could also be allocated to national broadcasting services, or to a mix of commercial, community, and national broadcasting services on a shared basis. In such a hybrid multiplex approach, spectrum could be allocated to services such as Indigenous broadcaster NITV, should the proposed carriage of NITV using spectrum allocated to SBS not eventuate.<sup>21</sup>

Another possibility is that the channel could be used for new broadcasting services such as a mobile television network. Before the decision was made to allocate what was the “seventh” channel to the digital dividend band, industry participant Broadcast Australia argued that mobile television using a broadcast model (providing the same content to many users, in this case over mobile devices) would be an

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15 A “datacasting service” is defined in the BSA as a service using the BSB to deliver content in the form of text, data, sound, visual images, or some combination, while a “broadcasting service” is defined as a service that “delivers radio or television programs to persons having equipment appropriate for receiving that service, whether the delivery uses radiofrequency spectrum, cable, optical fibre, satellite or any other means...but does not include a service... that provides no more than data, or no more than text (with or without associated still images” : s. 6 BSA. While datacasting services were authorised on a trial basis for a number of years, they did not become as popular or widespread as the government originally anticipated.

16 Digital Dividend Green Paper, pp 12-13.

17 In the context of the digital dividend, the government has considered what broadcasting uses the digital dividend itself might be put. Digital Dividend Green Paper, pp 18-22.

18 DBCDE, “Community Television” (26 May 2011), [http://www.dbcde.gov.au/television/community\\_television](http://www.dbcde.gov.au/television/community_television).

19 Media, Entertainment & Arts Alliance, Submission to *Australian Communications and Media Authority Spectrum reallocation in the 700MHz digital dividend band Discussion Paper* (December 2010), p 4, [http://www.acma.gov.au/webwlr/\\_assets/main/lib311973/media%20entertainment%20arts%20alliance\\_ifc34-2010.pdf](http://www.acma.gov.au/webwlr/_assets/main/lib311973/media%20entertainment%20arts%20alliance_ifc34-2010.pdf).

20 BSA, ss 35A, 35B.

21 The government’s review of Indigenous broadcasting recommended that NITV’s funding be extended, and that the service become available more widely on a non-subscription platform: *Review of Australian Government Investment in the Indigenous Broadcasting and Media Sector* (2010), pp 6-8, [http://www.arts.gov.au/\\_data/assets/file/0018/94500/broadcasting-review.pdf](http://www.arts.gov.au/_data/assets/file/0018/94500/broadcasting-review.pdf). In September 2011, the Minister asked for SBS and NITV to discuss a possible non-subscription NITV service: [http://www.minister.dbcde.gov.au/media/media\\_releases/2011/245](http://www.minister.dbcde.gov.au/media/media_releases/2011/245).



ideal use for a seventh channel allocated to broadcasting uses.<sup>22</sup> The same argument could be applied to the sixth channel.

The sixth channel might also be used to introduce additional services, such as datacasting, open narrowcasting, or additional subscription television services, although these possibilities would be less likely, unless made part of the hybrid approach discussed above, where several types of broadcasters would share the channel. With respect to datacasting, while trials were conducted for a number of years from 2003 to 2010, ultimately the ACMA decided not to authorise their continuation, as the size of the digital dividend has made it unlikely that spectrum will be available for datacasting on a long-term basis—at least in the form currently allowed in the BSA. However, datacasting and narrowcasting uses might be able to be accommodated in a hybrid multiplex approach, alongside more traditional television broadcasting.

## The committee noted that decoupling the licensing of broadcasting spectrum from content obligations would lead to a more efficient use of spectrum, but did not outline what form that use might take.

### 3.3 Technical migration and the development of new broadcasting technologies

The sixth channel might be left unallocated for a specific purpose, and kept available for the introduction of new technologies on a short- or medium-term basis.

The introduction of 3D television in Australia was licensed as temporary “scientific” trials, using unallocated BSB spectrum. In general, scientific apparatus licences of up to 12 months in duration may be issued under section 100 of the RA for trials of new radiocommunications technology that relate primarily to trialling technical functions, where BSB spectrum is not currently in use, no interference to existing services is expected, and other requirements are met, including regarding the purpose of the trial and other demand for the spectrum in question.<sup>23</sup> Reserving the sixth channel for the development and introduction of supplementary television broadcasting technologies may be particularly appealing to non-subscription broadcasters if the demand for 3D television content increases. It might also be used to conduct a technical trial of audio description services, subject to funding approval.<sup>24</sup>

While allocating the sixth channel for the development and introduction of supplementary television broadcasting technologies may be

particularly appealing to non-subscription broadcasters, its permanent assignment for such purposes is another matter, given the spectrum already available for these services. Each of the three commercial broadcasters currently offer two SDTV services and a single HDTV service within their existing 7 MHz allocation. Upgrading the HDTV offering to a 3D television offering is technologically possible, although it might be necessary to reduce the quality of one or both SDTV services at times to do so.

The sixth channel might also be part of a strategy for facilitating migration to new digital television transmission platforms, such as those using more advanced technologies such as MPEG-4 and DVB-T2, which allow for better compression and thus the more efficient use of spectrum.<sup>25</sup> Particularly in the case of a possible post-digital dividend migration from the current standard of DVB-T to DVB-T2, simulcasts of broadcasts using both standards might be a necessary part of such a transition, as viewers would need receivers capable of receiving broadcasts in MPEG-4/DVB-T2 format. Although the majority of new televisions on the market are MPEG-4-compliant,<sup>26</sup> the same is not true of DVD-T2. While only some viewers would need to update equipment (either the television itself or a set-top box) to receive MPEG-4 broadcasts, even those with new television sets would need to replace them to receive broadcasts using DVD-T2 technology.

It is unlikely that such a transition would be considered seriously before restack and reallocation of the digital dividend is completed, however. Moreover, while non-subscription broadcasters have strongly advocated the permanent retention of additional BSB spectrum for broadcasters to migrate to new digital television transmission technologies (such as those using DVBT-2 and MPEG-4), as well as for conducting scientific trials of new broadcasting technology such as 3D television,<sup>27</sup> subscription television providers maintain that the efficient use of spectrum post-switchover would enable migrations to new broadcasting technologies within spectrum currently allocated.<sup>28</sup>

### 3.4 Expansion of digital radio to regional Australia

Permanent digital radio services using DAB+ technology have been introduced to Australia’s five major metropolitan areas (Adelaide, Brisbane, Melbourne, Perth, and Sydney). Following decisions regarding the size and configuration of the digital dividend, in 2010 the Minister allocated two 7 MHz channels to support the possible introduction of digital radio services to rural and regional Australia.<sup>29</sup>

Proponents of digital radio have advocated the allocation of three channels nationally for digital radio services. For example, SBS has argued that three contiguous VHF Band III channels would provide the minimum amount of spectrum necessary to provide DAB+ broadcasts throughout Australia without interference, while accommodating all existing radio broadcasters.<sup>30</sup> However, making a third VHF Band III

22 Broadcast Australia, *Response to Government’s Digital Dividend Green paper* (February 2010), pp 4, 17, <http://www.broadcastaustralia.com.au/assets/files/White%20Papers/Broadcast%20Australia%20Digital%20Dividend%20Green%20Paper.pdf>. Broadcast Australia has conducted a number of trials of mobile television technology, last doing so in early 2007. Broadcast Australia, “Mobile TV Trials”, <http://www.broadcastaustralia.com.au/broadcasting/tv-services/mobile-tv/mobile-tv-trials>.

23 ACMA, *Dealing with Applications for Apparatus Licences for the Trial of New Radiocommunications Technologies—Guidelines* (February 2010), pp 2-4.

24 The Minister recently announced that a 13-week audio-description trial would take place in the second half of 2012. Senator the Hon Stephen Conroy, “Audio Description Trial on ABC in 2012” (22 February 2012), [http://www.minister.dbcde.gov.au/media/media\\_releases/2012/020](http://www.minister.dbcde.gov.au/media/media_releases/2012/020). No mention has been made yet of the spectrum to be used for this trial.

25 ACMA, *Beyond switchover: the future technical evolution of digital terrestrial television in Australia—Discussion paper* (January 2012), pp 25-29.

26 Owners of new television sets in Australia may already be able to receive broadcasts using MPEG-4 technology, as television receivers sold in Australia must be MPEG-4-compatible to be endorsed by Freeview, the representative of non-subscription digital television services. See Freeview website, <http://freeview.com.au/faq/faq.aspx?categoryId=3>.

27 Free TV Australia has made this point in a number of contexts: *Submission by Free TV Australia Limited to the ACMA paper—Limited Temporary trials of 3D TV and other emerging technologies* (20 October 2010), p 11, [http://www.freetv.com.au/media/Submissions/2010-0010\\_SUB\\_FINAL\\_3DTV\\_trials\\_201010.pdf](http://www.freetv.com.au/media/Submissions/2010-0010_SUB_FINAL_3DTV_trials_201010.pdf); *Submission by Free TV Australia Limited* (5 March 2010), pp. 8-12, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0014/127031/Free\\_TV\\_Australia.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0014/127031/Free_TV_Australia.pdf); *Submission by Free TV Australia to the ACMA paper, Spectrum reallocation in the 700 MHz digital dividend band* (13 December 2010), p. 4, [http://www.acma.gov.au/webwr/\\_assets/main/lib311973/freetv\\_ifc34-2010.pdf](http://www.acma.gov.au/webwr/_assets/main/lib311973/freetv_ifc34-2010.pdf).

28 ASTRA, *ASTRA Submission to: Spectrum reallocation in the 700MHz digital dividend band* (December 2010), p 4, [http://www.acma.gov.au/webwr/\\_assets/main/lib311973/astra\\_ifc34-2010.pdf](http://www.acma.gov.au/webwr/_assets/main/lib311973/astra_ifc34-2010.pdf).

29 *Australian Communications and Media Authority (Realising the Digital Dividend) Direction 2010* (ACMA instructed to reserve 14 MHz of VHF Band III spectrum in each of the five major metropolitan licence areas for the provision of digital radio broadcasting services).



channel available for DAB+ purposes may be difficult given that the sixth channel is likely to be located in UHF spectrum.

While theoretically possible, it is unlikely that the Minister would reverse his 2010 decision to allocate three channels to digital radio, particularly when no decision on the future of analog radio broadcasting has been made, and it is unclear that DAB+ technology would be suitable for regional and remote areas.<sup>31</sup> Although three channels would enable better access to DAB+ digital radio broadcasts and reduce interference in more congested markets, it may not be the most efficient means of reaching all Australians.

The regulation and technical characteristics of DAB+ multiplexes are such that a certain amount of spectrum allocated to digital radio is likely to remain unused in many areas. Under current licensing arrangements, wherever a DAB+ multiplex is operational 1.536 MHz would be set aside for a small number of services—two commercial licensees and one community licensee.<sup>32</sup> This arrangement would apply regardless of whether that number of qualifying licensees existed in the relevant licence area. Moreover, although a 7 MHz channel may accommodate four DAB+ multiplexes, the need to manage interference between signals means that frequency blocks cannot be reused in geographically adjacent licence areas (and perhaps not in the next adjacent licence area as well), so in practice the capacity of a channel for DAB+ services is lower.

It is unlikely that full coverage of Australia could be achieved with DAB+ technology. DAB+ transmissions do not have the broad geographic scope of AM radio, and thus may be an unviable option for rollout in less populated areas. At this time, a practical alternative digital radio broadcasting technology that could achieve full coverage, including in remote areas, is not available.<sup>33</sup>

#### 4. Conclusion

Developments are taking place outside of the digital dividend and reallocation process that may influence decisions on the future of the sixth channel. For example, it has been suggested that, in the not so distant future, spectrum bands that are highly valuable for both broadcasting and mobile applications would be allocated almost exclusively to mobile broadband, implying that broadcasting content would be carried primarily by fixed data networks such as the National Broadband Network (*NBN*).<sup>34</sup> As the NBN is in its infancy, this vision is still theoretical, and will not necessarily influence the allocation of the sixth channel. However, it is interesting to speculate how demand may change as fixed data networks continue to develop.

In addition, while the government's Convergence Review<sup>35</sup> is unlikely to consider the optimal uses for the sixth channel, the committee's interim report advocated for a uniform approach to allocating and managing broadcasting and non-broadcasting spectrum—implying the eventual removal of the concept of the BSB. The committee noted that decoupling the licensing of broadcasting spectrum from content obligations would lead to a more efficient use of spectrum, but did not outline what form that use might take.<sup>36</sup>

The objectives of the relevant legislation provide some possible guidance on the best use for the sixth channel. With respect to spectrum management generally, the RA requires reference to a number of aims, including maximising the public benefit through the efficient allocation and use of spectrum, and making adequate provision for the use of spectrum by public or community services. With respect to the regulation of broadcasting, the objects of the BSA include a number of aims, such as promoting diversity in broadcasting content, developing "a sense of Australian identity, character and cultural diversity", and providing Australians with "high quality and innovative programming".<sup>37</sup> Taken together, these objectives provide a possible framework for considering the future of Australia's last nationally-available 7 MHz channel of BSB spectrum: to a use or uses that best balance economic and other efficiency aims with the public benefit to Australia of a vibrant, diverse and innovative broadcasting sector. Community television services, which if not allocated spectrum from the sixth channel face an uncertain future, are likely to be part of any such consideration.

### the sixth channel is unlikely to be available for permanent uses prior to restack being completed, which is unlikely to be earlier than the end of 2014

In any event, the sixth channel is unlikely to be available for permanent uses prior to restack being completed, which is unlikely to be earlier than the end of 2014. Any earlier introduction of permanent broadcasting services in the sixth channel would result in the possible relocation of those services, and might interfere with the restack of existing digital television services. However, given the high level of interest in the sixth channel, and the potential complexity of any decisions on its future, it is not too early to start serious consideration of its future.

It is of course possible that no decision will be made, and the current default situation will remain—in which the ACMA may use its powers to authorise temporary use of unallocated BSB spectrum, as long as "possible future demand" is taken into account.<sup>38</sup> Whether this result would be in the best interests of both industry and the greater public is, however, another question.

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30 Special Broadcasting Service, *SBS Submission—Spectrum reallocation in the 700 MHz digital dividend band Discussion Paper* (2010), p. 4, available at [http://www.acma.gov.au/webwr/\\_assets/main/lib311973/sbs\\_icf34-2010.pdf](http://www.acma.gov.au/webwr/_assets/main/lib311973/sbs_icf34-2010.pdf).

31 DBCDE, *Review of technologies for digital radio in regional Australia: Final report* (7 October 2011), [http://www.abcde.gov.au/\\_data/assets/pdf\\_file/0003/140187/Final\\_Report\\_-\\_PDF\\_version\\_for\\_website\\_111011.pdf](http://www.abcde.gov.au/_data/assets/pdf_file/0003/140187/Final_Report_-_PDF_version_for_website_111011.pdf). The findings reported included that there is currently a preference for DAB+ technology, a general understanding that DAB+ may not be suitable in all regional licence areas, and a preference for DRM technology where DAB+ may not be appropriate (pp 21-22).

32 Each DAB+ multiplex occupies 1.536 MHz (also known as a "frequency block"). ACMA, "Digital radio" (11 May 2011), [http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC\\_90054](http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_90054).

33 While Digital Radio Mondial (DRM) and Digital Radio Mondiale Plus (DRM+) technologies present possible alternative to the introduction of digital radio in regional and remote areas of Australia, at this time they are not as advanced as DAB+ at a commercial level, including in the availability of receivers that will also receive DAB+, as well as AM/FM transmissions.

34 Telstra's Brian Miller (spectrum policy group manager) noted at the ACMA's RadComms 2011 conference that in 20 years spectrum bands below 5 GHz would be predominantly reserved for mobile broadband. R Crozier, "Telstra spies spectral swathe for broadband", *IT News for Australian Business* (26 May 2011), <http://www.itnews.com.au/Tools/Print.aspx?CIID=258674>.

35 In December 2010, the Australian government has established an independent review of Australia's communications and media regulation. The review committee is due to release its final report in March 2012.

36 DBCDE, *Convergence Review—Interim Report* (December 2011), pp 6-7.

37 RA, ss 3(a), (b)(ii); BSA, ss 3(a), (e), and (f).

38 BSA, s 34 (alternative uses of broadcasting services bands).

# Cloud Computing in the Wake of MegaUploads

Joelle Vincent considers the implications for cloud computing industry following the investigation and shutting down of online storage service provider, MegaUploads.

Cloud computing has been a buzz topic for a while, as companies seek the benefit of its scalability, availability and efficiency. We are now, however, starting to see some cautionary tales of its use. The much publicised recent shutdown of online storage service provider MegaUploads raises important issues to be considered by users of cloud computing. Time and resources need to be spent on due diligence to understand what services the cloud provider is offering and to ensure that the cloud provider is an appropriate and trustworthy supplier of those services.

**MegaUploads users had access to their data cut off, regardless of whether or not it is suspected of being copyright infringing material.**

## Background

MegaUploads was a cloud storage solution business and, according to the United States government's indictment against it, at one time was estimated to be the thirteenth most frequently visited site in the world.<sup>1</sup> Its shutdown is one of the largest criminal copyright cases in history. The specific claims relate to conspiracy to commit racketeering, copyright infringement and money laundering, criminal copyright infringement by electronic means and by distributing a copyrighted work being prepared for commercial distribution, aiding and abetting criminal copyright infringement, fraud by wire and aiding and abetting fraud by wire.<sup>2</sup>

There is sufficient drama surrounding the case to ensure that the details of it have received much attention. MegaUploads founder Kim DotCom is a larger-than-life character: reportedly a German hacker millionaire who lives in the most expensive house in New Zealand and owns 18 luxury cars with numberplates like 'HACKER', 'GUILTY' and 'GOD'.<sup>3</sup> The alleged facts of his arrest have included that he hid in a safe room with a sawn-off shotgun while police cut their way through the metal door.<sup>4</sup> Kim DotCom has since been reported to have made accusations that he was beaten by police during the arrest and that once in prison was contacted by a person who, claiming to be a prosecutor, offered to guarantee his release for a fee.<sup>5</sup>

However, the issue for readers of this publication and concern for legitimate users of cloud services is that all MegaUploads users had access to their data cut off, regardless of whether or not it is suspected of being copyright infringing material.

## The Incident

MegaUploads offered a digital locker storage service where users anonymously upload digital files to be accessed via URL by themselves or other users.

Significantly, the MegaUploads site was structured primarily as a temporary storage solution. Unless users paid a premium fee for permanent storage, material was retained for only three months from the time it was uploaded.

It is alleged in the Indictment that this means that the main purpose of MegaUploads was to enable illegal file-sharing of material such as films, music and software.<sup>6</sup> Evidence referred to in the Indictment suggests that this was in fact the MegaUploads business model.<sup>7</sup> The site offered financial incentives to users whose uploaded files are the most popular downloads: most commonly these would be pirated copies of unreleased or newly released films and television shows.

However, legitimate use of the site had also been made by many people, including to legally share copyright material, to backup data from computers and even as a primary storage solution.

It is not known to what degree, if at all, such legitimate users will ever be able regain access to their materials. In most cases access is time-sensitive and the damage will have already been done. Access will only be restored if the alleged infringers are found innocent and resolution of the case could take months.

It even appeared at one point that the data may be deleted in the interim. MegaUploads' data hosting service provider threatened to delete the data if it did not receive the ongoing payments it was owed by MegaUploads. Payment appeared to be unlikely given the seizure of MegaUploads' directors' assets. The data hosting service provider has since released statements that there is no imminent data loss for MegaUploads users and that it will attempt

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1 Superseding Indictment filed by The United States in the United State District Court for the Eastern District of Virginia on 16 February 2012, paragraph 13.

2 Indictment, filed by The United States in the United State District Court for the Eastern District of Virginia, 5 January 2012; Superseding Indictment, filed by The United States in the United State District Court for the Eastern District of Virginia, 16 February 2012.

3 Amrutha Gayathri, 'Kim Dotcom: 10 Most Strange Facts About the MegaUploads Founder' 4 February 2012, *International Business Times*.

4 Above n4.

5 Greg Sandoval, 'Bail denied again for MegaUploads' Kim Dotcom', 3 February 2012, *CNET News*.

6 Superseding Indictment filed by The United States in the United State District Court for the Eastern District of Virginia on 16 February 2012, paragraph 2.

7 Superseding Indictment filed by The United States in the United State District Court for the Eastern District of Virginia on 16 February 2012, paragraph 5.

## MegaUploads suggest that jurisdiction will not necessarily be a barrier to enforcement and that the inherently global nature of cloud computing may be reflected in its legal ramifications.

to assist legitimate users to regain access.<sup>8</sup> In the absence of direct contractual relationships with individual users, the data hosting service provider's desire and ability to fulfil this ambition remains to be seen.

### Implications

While MegaUploads does involve some extreme circumstances, it is not difficult to imagine the same user access difficulties arising with less colourful cloud computing providers. In fact, many other consumer-oriented services have already responded by altering, relocating or shutting down altogether their file-sharing oriented storage solutions.

The occurrences in MegaUploads suggest that jurisdiction will not necessarily be a barrier to enforcement and that the inherently global nature of cloud computing may be reflected in its legal ramifications. The copyright holders who are losing the most to online piracy, and are therefore the most invested in actions such as this, are the United States entertainment industry major players. So, it is likely that any future actions of this scale in relation to illegal file sharing will follow a similar model of United States Government indictment, arrest and (as will be relevant in most cases) extradition. As we have seen, the United States Government may have the right to demand access to a cloud provider's system regardless of where it is hosted and actions by law enforcement agencies in other countries in relation to such an inherently global system as cloud computing can affect users in Australia.

### Lessons Learnt

What has happened to MegaUploads and its directors and users certainly does not mean that businesses should avoid using cloud computing.

As such services become increasingly available and commonplace, MegaUploads is a timely reminder to apply caution about the choice and use of a cloud solution.

Businesses looking to take up cloud computing services can minimise the risks by taking certain precautions. For example interested business should:

- research and evaluate cloud service providers for trustworthiness – not just in relation to their stance on intellectual property rights but also with regard to potential bankruptcy, which could result in loss of access for users;
- make sure they use a business-focused cloud solution, as consumer-oriented services are more likely to be used by other users for copyright infringement and become the target of investigation by law enforcement agencies, resulting in interruption of services;
- consider using a private cloud model rather than publicly driven infrastructure;
- ensure adequate contractual protection of the service relationship (for example, review access service levels and credits where those levels are not met; review maintenance windows and ensure the provider steps up to compliance with laws in conducting the service);
- be wary of employees risking data loss by independently using consumer-oriented services to store corporate data and consider establishing employee policies regarding cloud storage; and
- ensure that data stored on the cloud is always readily available in back-up elsewhere and have a plan in place in case their cloud computing solution becomes suddenly unavailable.

**Joelle Vincent is a third year lawyer at Allens Arthur Robinson, in the intellectual property practice group.**

8 Carpathia Hosting's Updated Statement on Megaupload Servers and Customer Data (2012), viewed on 23 February 2012, <http://www.carpathia.com/carpathia-hostings-updated-statement-on-megaupload-servers-and-customer-data>; Megaretrieval (2012), viewed on 23 February 2012, <http://www.megaretrieval.com/>.

## Communications and Media Law Association Incorporated OPTUS 'TV NOW' SEMINAR

The widely reported Federal Court decision in *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* raises copyright issues that go to the core of how broadcasters buy TV content in Australia and how it is watched. In what's likely to be a long-running Court room drama, an appeal to the Full Federal Court is being heard this month.

In this seminar, three media law experts from different sides of the argument will review the 'TV Now' decision and legal and political developments since it was handed down. The discussion will be interactive (as you'd expect) and compulsory viewing for industry people who like their telly.

### Panellists

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- **Tony O'Reilly, Partner, Kennedy Lawyers**
- **Kimberlee Weatherall, Associate Professor, Sydney Law School, The University of Sydney**

**Hosted by Andrew Wiseman, Partner, Allens Arthur Robinson**

**Thursday 29th March**

5:45 pm for 6:00 pm start

Drinks and canapés from 7:00pm

Allens Arthur Robinson

Level 28, Deutsche Bank Place, 126 Phillip Street (cnr Hunter & Phillip Streets), Sydney

**Please RSVP by Thursday 22nd March.**

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Issues of interest to CAMLA members include:

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

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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 the editors at editors of the Communications Law Bulletin at [editors@camla.org.au](mailto:editors@camla.org.au) or to

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