

NetLaw 2006 Update

* TO BE READ IN CONJUNCTION WITH THE 2005 NETLAW UPDATE *

Chapter One: The Digital Environment

[1.5] The Australian Communications and Media Authority (ACMA)

On 1 July 2005 ACMA replaced the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA). Despite the name change the functions performed by ACMA are largely a continuation of previous bodies. ACMA is the regulatory authority for Radio and Television, Telephones, Media Licences and Industry Self-Regulation. ACMA is also involved in supervising Consumer Protection involving such matters as SPAM and other objectionable content in the media. Unfortunately little information is provided regarding its determinations on these matters.

ACMA < <http://www.acma.gov.au> > (visited 22 February 2006)

All references to the ABA or the ACA in *NetLaw* now refer to ACMA.

[1.50] Online Freedom

The Global Online Freedom Act 2006 has recently been introduced in the United States Congress. The Bill seeks to legislate minimum standards with respect to 'free speech' across the Internet where the jurisdiction of the United States can be established. The Bill is only in its early stages of being considered so it is likely there will be significant amendments. The issue involves not just censorship considerations but also what is the most appropriate forum for such matters to be determined – one possible option would be for the United Nations to deal with such matters.

More information on this issue is available from

Rebecca McKinnon 'RConversation'

Research Fellow, Berkman Center for Internet and Society, Harvard Law School

< http://rconversation.blogs.com/rconversation/2006/02/global_online_f.html >

(visited 22 February 2006)

Chapter Two: Legal Systems

[2.22] China and Google

In January 2006 the Internet Search Company Google announced that it will offer a censored version of its services for users in China. This is a significant decision. If a user in China for example seeks information about the 1994 Tianerman Square massacre where Chinese Government troops killed several protestors only the official version is available. See also **[6.31]** regarding France and Yahoo!

More information on this issue is available from

ABC News Online 'China to Get Censored Google Service'

25 January 2006

< <http://www.abc.net.au/news/newsitems/200601/s1555049.htm> >

(Visited 22 February 2006)

[2.52] In *Kaplan v Go Daddy Group & 2 Ors* [2005] NSWSC 636 (24 June

2005) the New South Wales Supreme Court considered the web blog at < <http://www.hunterholdensucks.com> > where visitors to the site were encouraged to leave their comments about Hunter Holden Automotive. Several postings included disparaging information about fraud, overcharging and stolen cars. The Court discussed many issues such as defamation and the prospect of an injunction being granted so as to prevent further harm occurring [See 2.25-2.33]. Orders were made for the site to be taken down.

[2.62] 'Think Globally and Act Locally'

A frequently heard expression throughout the 1980s and 1990s was to 'Think Globally and Act Locally'. The idea was to think big but carefully consider local conditions. It might seem appropriate given the experience of [6.31] France and Yahoo ! and China and Google [2.22]. The statement also refers to the nature of the Internet as discussed in **Chapter One: The Digital Environment** where emphasis was placed on communication systems overcoming the tyranny of distance.

Chapter Three: Dispute Resolution

[3.45] In July 2004 the Third Forum on Online Dispute Resolution was held in Melbourne, Australia. It was hosted by the International Conflict Resolution Centre at the University of Melbourne in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). The diverse range of presentations included papers from legal practitioners, judges, mediators and arbitrators. This was the first occasion where the topic of ODR was formally discussed in Australia. Proceedings from the Forum are available from the Center for Information Technology and Dispute Resolution, University of Massachusetts, Amhurst in the United States < <http://www.odr.info/unforum2004/> > (visited 22 February 2006).

Katsh in his article 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace' reviews the history of Online Dispute Resolution. He also identifies that Online Dispute Resolution grew from the need to bring parties together that were separated by great distances. Emphasis is placed upon changes in technology that bring about new ways of communicating [See 9.1-9.54]. These developments are however tempered with the belief that existing court mechanisms for resolving disputes are to be preferred.

More information on this issue is available from
E Katsh 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace'
Lex Electronica, vol.10 n°3, Hiver/Winter 2006
< <http://www.lex-electronica.org/articles/v10-3/katsh.htm> >
(visited 22 February 2006)

Chapter Five: Privacy Issues

[5.17] The Victorian and Civil Administrative Tribunal recently made a determination based upon the Victorian Information Privacy Principles in the *Information Privacy Act 2000 (Vic)*. In *WL v La Trobe University (General)* [2005] VCAT 2592 (8 December 2005) the tribunal clarified the definition of personal information'. The applicant had participated in a health study conducted by LaTrobe University. The applicant had provided personal information via telephone and their number had been recorded. Concern was expressed about the ability to identify the person through the use of cross matching techniques using other databases. The Tribunal determined that the legislation requires an element of reasonableness about whether the person's identity could be

ascertained from the information and that this would have to be decided on the circumstances of the case. On the facts before the Tribunal even if cross matching techniques were undertaken the applicant could not be identified with certainty.

[5.51] Family Law and Blogs

The Digital Environment empowers small groups and individuals [See 1.1-1.50]. The Federal Magistrates Court in *Y & H [2005] FMCAfam 229* (18 May 2005) issued an injunction to restrain a mother from distributing on her website information which could be used to identify her child which was the subject of a family dispute. This was the first occasion in which an Australian Court has considered a weblog – or personal web diary [See also 8.49].

Chapter Six: Censorship Considerations

SPAM Review

The Federal Government recently released an Issues Paper that reviews the *SPAM Act 2003* (Cth). The Issues Paper attempts to outline the legislation in context. Submissions closed on 1 February 2006. The Minister for Communications, Information Technology and the Arts will table a report in April 2006. The document is available from < http://www.dcita.gov.au/ie/spam_home/spam_act_review > (visited 22February 2006).

The 2005 Update for *NetLaw* provides a summary of the legislation.

The Issues Paper provides a summary of ACMA's actions under the legislation with respect to SPAM. Approximately 350 businesses have been warned, there have been 13 formal warnings or fines, 5 formal notices demanding further information and only 1 prosecution, which is still ongoing. It should also be noted that s547J of the *Telecommunications Act 2000* (Cth) was amended to allow 'access to computer data that is relevant to the Spam Act 2003' in the form of search warrants.

The overall approach embodied in the legislation is very much akin to the legislative scheme regarding pornography online [see 6.12-6.31]. Despite the Issues Paper being almost 50 pages in length very little information is available regarding the types of matters in which ACMA decided to take action and the situations where it decided to abstain. It is disappointing to observe that little has been gained from the discussion that took place with respect to the legislative scheme established by the *Broadcasting Amendment (Online Services) Act 1999* (Cth). Whilst it may be argued the frequency of Spam may have diminished as a consequence of the Spam legislation such an approach is difficult to quantify. It is unfortunate that the general discussion at the Federal level with respect to the Digital Environment still maintains a very narrow focus.

Chapter Seven Proprietary Interests

[7.25-7.26]

Kazaa a P2P file sharing network. The Australian Federal Court In *Universal Music Australia Pty Ltd v Sharman License Holdings Pty Ltd* [2005] FCA 1242 (5 September 2005) found that Kazaa was liable for assisting or encouraging the distribution of copyright protected music. Kazaa's knowledge that its services could be used for such purposes and its failure to take appropriate

action was noted by the Court. The matter is subject to appeal in 2006. The decision is also relevant concerning jurisdiction given the corporate structure of the Kazaa network **[See 2.7-2.52]**. In June 2005 the Supreme Court of the United States brought down a similar decision with respect to the knowledge of P2P service providers and copyright infringement. In the unanimous decision of *MGM Studios, Inc. v. Grokster, Ltd.* (04-0480), 545 U. S. , 125 S. Ct. 2764 (2005) the Court held that Grokster and Steamcast (maker of Morpheus a P2P file sharing network) were liable.

The International Federation of Phonogram and Videogram Producers (IFPI) which represents the recording industry worldwide in January 2006 released an important document which highlights not only legal developments but also movements in the marketplace with regard to music downloads around the world. The complete report 'Music Industry – IFPI:06 Digital Music Report' is available from

< <http://www.ifpi.org/site-content/library/digital-music-report-2006.pdf> >
(visited 22 February 2006).

[7.49] Additional Domain Names include the following:

.asn – association, political party, trade union or other industrial body or club
.id – personal name

[7.52] In *Ward Group Pty Ltd v Brodie & Stone Plc* [2005] FCA 471 (22 April 2005) the Federal Court held that overseas websites must specifically target an offer of goods at Australian customers before it can amount to a trade mark infringement in Australia... The case is an important decision that has significant implications for trademark owners, solicitors providing legal advice and those involved with the sale of goods on the Internet. The matter involved the sale of anti-greying hair lotions. His Honour Justice Merkel noted that constructing a website which is not based in Australia containing a trademark without a clear intention for it to be downloaded in that particular jurisdiction does not amount to the mark being used in Australia **[See 2.77-2.52]**. Something more is required if an action regarding trademark infringement is to be successful. The Court also indicated that legal practitioners should understand the Digital Environment before providing legal advice on such matters.

Further information on this matter is available from J Brien, C Brien 'No Trademark Infringement Via the Internet: *Ward Group Pty Ltd v Brodie & Stone Plc* [2005] FCA 471 (22 April 2005)' in the *Internet Law Bulletin* LexisNexis 2005.

Chapter Nine Digital Strategies

[9.55] The More things Change, The More they Stay the Same

The American jurist Oliver Wendell Holmes in his book *The Common Law* that was first published in the late nineteenth century noted 'The Life of the Law has not been logic, but experience'. This statement is relevant with respect to the Digital Environment. Rather than continue to use out-dated legal principles the law should develop alongside society. In the first chapter of *NetLaw* it was noted that 1994/5 was the year in which the Internet was widely embraced by society **[1.2]**. Whilst almost 10 years have passed since this event, it is evident that more time is needed to fully understand and appreciate the Digital Environment.