

- 33 Australian Copyright Council, "Licensing Content for Multimedia", December 1997, at 19
- 34 If less than a substantial portion of the third party's material is to be used, then the producer may not have to be concerned about infringing the copyright in the third party material, and copyright clearance will therefore not be necessary.
- 35 Breen, P, "Negotiating a Multimedia Contract" (1995) 4 *IPAsia* 11, at 16
- 36 It is interesting to compare Australia's moral rights proposals. The Attorney-General, in an address at the Moral Rights Consultation Forum on the 18 August 1998, revealed that Australia's legislation will include some form of waiver provisions, and these are likely to apply to all creators of copyright works and films. There was still uncertainty as to the extent of the waiver provisions, but it was stated clearly that the legislation will not provide for a general waiver of moral rights.
- 37 Sections 189 to 195AA of the *Copyright Act 1968*.
- 38 Gill, J, ed. *Multimedia Contracts Handbook. An Industry Guide*, 1998, Prospect, at P5-23
- 39 Breen, P, "Negotiating a Multimedia Contract" (1995) 4 *IPAsia* 11, at 15, 16
- 40 Gill, J, ed. *Multimedia Contracts Handbook. An Industry Guide*, 1998, Prospect, at P6-19
- 41 Australian Copyright Council, "Multimedia Producers and Copyright", July 1997, at 31
- 42 Australian Copyright Council, "Multimedia Producers and Copyright", July 1997, at 32
- 43 Conversation with Caroline Goldsteen, from the CLRC, on the 17 July 1998
- 44 Rees, D, "The Government's Proposals for Copyright Reform and the Digital Agenda" (1998) 17(2) *Communications Law Bulletin* 20
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E-commerce welcomes Lawyers to the New Economy (current as at 19/10/98)

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1. Introducing the New Economy

Welcome to the new economy. A world in which mind share replaces market share, knowledge capital is more valuable than plant and equipment, innovation is more important than mass production and where products are not sold but given away.

After 200 years of industrialisation there is a new economy emerging with new rules and a whole new language to learn.

Digital networks have replaced information as the basic building blocks of the economy. Where once value resided in those who controlled information, it is now shifting to those who use enabling technologies, such as the Internet, to create a wealth of new business relationships.

This paper focuses briefly on what the new economy means for lawyers. It looks at the themes of the new economy, the skill sets required to practice within it and considers some strategies needed to survive and prosper.

2. What is the New Economy?

At the core of the new economy is the concept of the networked world where digital technology and the Internet enable unprecedented interaction between individuals and organizations.

From this basic proposition has emerged powerful themes, some common sense others counter-intuitive, like the notion that more value is created when a product is given away than sold, but each designed to exploit the globalisation of networks. These themes include:

2.1 Co-opetition

When competitors co-operate. A nightmare for the Australian Competition and Consumers Affairs Commission but increasingly seen as a means of ensuring markets grow faster.

2.2 Convergence

When everything from the images of a sporting event, to the words of a book, to the sounds of music can be represented by binary 1's and 0's and delivered down the same pipe. The prospect of convergence is touted as the true "killer application" of the new economy.

2.3 E-commerce

When innovation and technology are applied to business processes. E-commerce, whether it's business to consumer or business to business, is now a mainstream business methodology that is destroying some old business conventions and mores.

2.4 Just in time learning

When the concept of just in time delivery seen in manufacturing is applied to knowledge professionals such as lawyers. It's about using technology to deliver the right tools to the right people when they need them.

2.5 Mindshare

When everyone knows your name. It seems everyone knows who Amazon.com is. It is replacing market share as businesses realize that it is not so much what you buy and sell today which is important. Rather, it's what people will be talking about tomorrow.

Whilst, many of the above themes may appear foreign to a traditional legal adviser, there is at least one theme of the new economy which all lawyers understand: speed. Above all else, the new economy is about speed.

The traditional cycle of business involved planning, building and shipping a product. A new model is, however, emerging. Increasingly businesses are sensing that something must be done, responding with a product and then thinking about the results before going through the cycle again.

What's more, the sense/respond/think cycle has been compressed and will be compressed again as innovation and technology enable products to be developed on the fly, marketed, delivered, assessed and refined not in years or months but in weeks, days or hours. This is not speculation as to the future of business, it's happening now.

3. What does the New Economy mean for lawyers?

Lawyers are slowly taking their place in the new economy. Although the exact nature of their role and the functions they perform may not yet be fully known, it is inevitable that lawyers will have a place in the new economy.

In the short term, however, there is a real risk that many lawyers will miss out in sharing the bounty of the new economy as the increasing speed of markets conspires to make them appear irrelevant.

No one would argue that speed is new to lawyers. Clients and the circumstances of a matter are always demanding the urgent delivery of legal services.

In the past lawyers have responded to the challenge of speed by relying on the countless precedents created by the generations of lawyers before them. These lawyers captured in contracts, statutes and judgements the legal landscape of commercial relationships. Young lawyers have then been taught to identify these relationships and leverage the collective experience of the profession so as to deliver legal services on time.

But for the lawyer, faced with a client who embraces the new economy there are few precedents upon which to rely. There are few contracts,

statutes and judgements that can readily be leveraged. Rather, the lawyer must think and mold through a process of analogy and imagination the new business relationships of the new economy. To make matters worse they must do so in sync with business cycles that are moving faster than we have ever experienced before.

Faced with this realisation, lawyers must develop new strategies and skills designed to ensure that they can continue to add value. Otherwise they risk not only missing out on a once in a lifetime opportunity but losing their client base in the process.

4. Skills set for the lawyers in the New Economy

"E-commerce lawyer" reads the advertisement, "Top tier legal practice requires lawyer with experience in web enabled business to business e-commerce and e-commerce service".

In no time, advertisements such as this will be commonplace. However, finding that "killer candidate" may be a tall order given the infancy of the new economy and web based e-commerce. In the absence of such a candidate, what skills does an e-commerce lawyer need?

For many the focus is on those with experience in intellectual property or information technology law. It is after all about computers isn't it?

E-commerce is primarily a way of thinking about business. A business adopting an e-commerce business platform will, above all else, require the skills of a commercial lawyer capable of advising and documenting the relationships which e-commerce makes possible.

For example, take a business wishing to embed into its website the ability for goods to be delivered to the customer. This business will generally be more concerned with its relationship with the delivery company than the technical means by which the other company knows to pick up the goods and deliver them to a customer.

In order for commercial lawyers to be e-commerce lawyers, there are two further characteristics they must possess:

- an understanding of what e-commerce is, and what it means for clients and their industries; and
- a powerful imagination.

Whilst the latter quality is perhaps seldom associated with lawyers, for us it is the essential ingredient which currently defines what it means to be an e-commerce lawyer. The ability to anticipate the unimagined is an ability that will enable the commercial lawyer not only to solve problems, but also to create opportunities for their client in the new economy.

5. Strategies

In the past, the law and lawyers have generally been ill equipped to deal with change, let alone changes as dramatic as those which come with the new economy. Here are a couple of strategies to consider.

5.1 Think now

The emergence of the new economy requires all lawyers to be thinking about the law and the new economy and how they relate to their clients' businesses now. If you wait to be asked, you may find that your market has passed you by.

For example, given predictions that the current golden child of the new economy (e-commerce) will profoundly change the nature of business processes, lawyers should be thinking about how to ensure that the e-commerce business processes that their clients will shortly adopt are:

- lawful, and the virtual transactions conducted thereunder are as enforceable as a more traditional and corporeal transaction;
- adequately defined, so that each of the players involved with the e-commerce process is aware of both their rights and obligations; and

- conducted with knowledge of the legal risks that are associated with the e-commerce process.

5.2 Teaming

One traditional model of legal practice is that you don't do the work until a file is opened. This means that there is an inevitable delay as the lawyer waits for instructions, opens the file, digests the instructions and then works towards a solution.

This delay will become intolerable for businesses participating in the new economy. Faced with the choice of waiting for the lawyers to signoff and getting a product to market the business may sooner proceed to market in the knowledge that there may well be legal flaws than risk losing the window of opportunity in which they can expect to make money.

What may be required is a rethink of the relationship between the lawyer and the client and the manner in which they interact. Lawyers will need to sense the market alongside the client to ensure that steps are taken along the way which will enable the client to respond with a minimum of legal friction.

The teaming approach maximizes the window of opportunity for the client's product. However, in order to work the approach may require a complete rethink on how information is exchanged between both parties, and the time costing revenue model which has been serving lawyers for years.

6. The Future

We may not always see the changes which transform our lives:-

1859: "Drill for oil? You mean drill into the ground and try to find oil? You're crazy!" Drillers whom Edwin Drake tried to enlist in his project to drill for oil.

1876: "This "telephone" has too many shortcomings to be seriously considered as a means of communication. The device is inherently of no value to us." Western Union Internal Memo.

1920: "The wireless music box has no imaginable commercial value. Who would pay for a message sent to nobody in particular?" David Sarnoff's associates in response to his requests for investment into radio.

1968: "'But what...is it good for?" Engineer at the Advanced Computing Systems Division of IBM, commenting on the microchip.

Whether the new economy is just the old one dressed up by a clever marketing department somewhere remains to be seen.

However, what cannot be ignored is that when you look beyond the buzzwords, business strategies are starting to reflect the themes of the new economy. Most notably, in the case of e-commerce many businesses are changing their market processes and the sum of these processes will, at least in part, define commerce in the future.

Unlike those who failed to recognize the changes that have transformed our lives, lawyers have no excuse for not recognizing the threats and opportunities that the new economy is bringing with it. More importantly, if you now take time to think about the new economy, you may avoid wondering later - with all the dubious benefits of hindsight - "What might have been, if only I had seen what was coming?"

Cyber Jurisdiction—Emerging Issues & Conflicts of Law when Overseas Courts Challenge your Web

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- 1.1 In considering the legal issues relating to jurisdiction and their application to the Internet, we are forced to think beyond the question of whether we "should" regulate the Internet and to consider whether we actually "can" regulate the Internet. In other words, do the Australian courts legally have jurisdiction to govern any particular activity on the Internet?
- 1.2 The issue is basic to maintaining a viable judicial system: when can one party require another party, which is located outside of Australia, to come and defend itself before the Australian courts? Or vice versa? Given the litigious world in which we live, this uncertainty in the area of jurisdiction has the potential to inhibit the growth of the Internet.
- 1.3 The jurisdiction of the conventional courts over disputes is geographically based - courts in Australia have power only over persons and things having some relationship with Australia, and courts in other countries or states only have jurisdiction over persons and things having some relationship with their own particular country or state.