

Welcome to the September edition of the journal. Our feature article by Andrew McRobert and Michael Pendleton examines the complex issues arising from the implications of the internet on copyright and private international law. Through a detailed analysis of the relevant technology and the law in these areas, Andrew and Michael state that the emergence of new technologies and the extension of the existing copyright regime to encompass these developments is rendering the current approach unworkable. Then Andrew and Michael conclude that to seek to strike a fair balance between access and restricting rights to information using 17th century causes of action is doomed to failure.

In his article, Rob Nicholls examines the controls on the Australian

importation and exportation of cryptographic technology. In part, Rob's examination covers the international controls on cryptography and their application in Australia and the US. Helpfully, Rob also explains the basics of cryptographic systems.

In his article, David Smith provides an overview of the relatively new business of Application Service Providers' "renting" applications to customers. David provides a checklist of some key legal issues to consider when establishing an agreement with an Application Service Provider. Graduate at Law, Patrick Ling examines Australia's legislative answer to cyber criminals and the viruses they create. Patrick also examines the adequacy of the current regime in dealing with viruses.

Finally, Patrick looks at how the proposed model criminal code will deal with this issue.

John Selby, a solicitor with Mallesons Stephen Jaques, outlines the cyber stalking class action suit lodged against Yahoo! Inc in Dallas Texas. John examines the issues involved, the consequences of a successful action and gives his view as to whether the action will be successful. Guy Betar, in his article, gives us a practical guide to the legal issues arising out of e-commerce. Guy also gives us an overview of how to take your business online.

We hope you enjoy this issue.



FIRST INTERNET PATENT CASE (ITALY)

The interesting issue raised before the Court of Padova in *Netfraternity v Payland* was whether it is possible to patent an idea for a commercial system, in particular, whether offering money to cyber-navigators as consideration for viewing advertising banners was the exclusive right of whoever first registered the system or whether such a technique could be copied.

The parties were two Internet companies, Netfraternity (the claimant) is the owner of Italian patent no. 1296354 under which users joining Netfraternity install software which compels them to receive advertising messages on a video banner occupying 10 per cent of the screen. In consideration for receiving the advertising messages, Netfraternity awards the users ITL 1,200 (approximately 38p) per hour of navigation. Payland (the defendant) offered the same kind of service on the ground that reproduction of the idea was free if performed using a different technical solution.

The controversy began on 12 May when a court officer seized Payland's server, interrupting its service. However, on 24 May the Court of Padova rejected Netfraternity's claim and refused to grant a preliminary injunction against Payland. As a consequence Payland will be able to


continue with its service paying ITL 2,000 (approximately 64p) per hour of navigation to whoever accepts the viewing of its advertising banners through its special software.

According to the Court, Payland's system does not interfere with the scope of the patent claims so there were no grounds for an infringement action.

The decision creates a precedent in Italy in the field of patents for technological products and the Internet. This issue is particularly topical in the context of the Internet in view of the ease with which it is possible to reproduce someone else's invention without "copying" its technical solution, which is the object of the patent. Sometimes the same result may be achieved in thousands of different ways.

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ELECTRONIC COMMUNICATIONS ACT (UK)

The Electronic Communications Act received royal assent on 25 May. The Act implements certain provisions of the Electronic Signatures Directive (1999/93/EC) which is intended to facilitate the use of electronic signatures and to contribute to their legal recognition throughout the EU. The Act is also compatible with the Cryptography Guidelines, published by OECD on 19 March 1997, and the UNCITRAL Model Law on Electronic Commerce. The broad aim of the Act is similar to that of the E-Commerce Directive, which was adopted by the European Parliament and Council of Ministers on 4 May and seeks to remove barriers to the development of e-commerce in the internal market but there is no overlap in the detailed provisions.

The Act aims to build confidence in e-commerce and the technology underlying it by providing for:

- an approvals scheme for businesses and other organisations providing cryptography services, such as electronic signature services and confidentiality services (Part I);
- the legal recognition of electronic signatures and the processes under which they are verified, generated or communicated (Part II);

- the removal of obstacles in other legislation to the use of electronic communication and storage in place of paper (Part II); and
- provisions to update procedures for modifying Telecommunications Act licences (Part III).

On the question of approvals, the Government would prefer an industry-led approvals scheme instead of the statutory scheme currently envisaged in Part I of the Act. The Alliance of Economic Business has drawn up the "tScheme" and the Government has said that it will not commence Part I of the Act if it continues to be satisfied that the tScheme meets Government objectives.

It will be for the court to decide in a particular case whether an electronic signature has been correctly used and what weight it should be given (e.g. in relation to the authenticity or integrity of a message) against other evidence (s7).

The power to modify legislation, contained in s8, is designed to remove restrictions arising from other legislation which prevent the use of electronic communication and storage in place of paper and enable such use to be regulated where it is already allowed. There are provisions in many statutes which may be interpreted as requiring the use of paper, often involving communication with Government departments or between business and individuals. One example of where the power may be used is in the context of the Companies Act 1985. A draft order concerning changes to the Companies Act has already been published for consultation.

However, the vast majority of contracts do not require paper and people remain free to contract using whatever form of communication they wish.

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MISUSE OF METATAGS (UK)

Metatags are the hidden words in a website that Internet search engines, (such as Microsoft Internet Explorer, Lycos and others) latch onto when identifying sites in response to searches. They are not immediately apparent to anyone visiting the site and yet are a means of attracting visitors. As such, most informed commentators had considered that the unauthorised use of a trade mark in the metatags amounted to infringement and could be restrained. In a brief decision of 25 May (which largely deals with costs), the English High Court has confirmed this (*Roadtech Computer Systems Ltd v Mandata (Management and Data Services) Ltd*). The claimant applied for and was granted judgment on admissions for infringement of registered trade marks (although what the admissions were is not identified in the judgment) and summary judgment on the passing off claim. As a result the substantive issue was not argued in open court. In what the judge called the easy part of his decision, he concluded that the trade mark case could not be in doubt and he favoured all the claimant's submissions on passing off.

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