for their games". The Commission also asserted that mod-chipping allows consumers to play both legally imported and legitimate backup copies of games, and that recent advances in easing the restrictions on parallel imports of computer software in Australia may be eroded as a result of this decision.[6]

[1] *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 (French, Lindgren, and Finkelstein JJ).

[2] The DVD regions are defined as including the following countries or geographic areas: 1 (North America), 2 (Japan, Europe, South Africa, Middle East), 3 (Southeast Asia and East Asia, including Hong Kong), 4 (Australia, New Zealand, Pacific Islands, Central and South America, and the Caribbean), 5 (former Soviet Union, India, Africa, North Korea, and Mongolia), 6 (China), 7 (Reserved), and 8 (airplanes, cruise ships).

[3] *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906 (Sackville J).

[4] *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906, [165]-[167]. It is interesting to note that although Stevens himself was unrepresented at first instance, the Australian Competition and Consumer Commission (the "ACCC") gave assistance to the court, and was allowed to appear as amicus curiae at the hearing. In the Full Federal Court, Stevens was represented by counsel.

[5] *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157.

[6] Australian Competition and Consumer Commission, "Consumers Lose in Playstation Decision" (31 July 2003).

Review of Digital Agenda Copyright Reforms

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The debate over the application of copyright law and policy in the digital age is alive again, with the commencement of the public consultation phase of a major review of the "Digital Agenda" copyright reforms that came into effect in March 2001. The review provides an opportunity for copyright owners and users to present their practical experiences of the operation of the legislative reforms, and to argue for changes where the reforms have not achieved their objectives. This article provides a brief overview of the reforms and the review process, and examines some of the issues that are expected to be particularly contentious.

The Digital Agenda Reforms

The *Copyright Amendment (Digital Agenda) Act 2000* (the **Digital Agenda Act**) implemented a comprehensive package of amendments of the *Copyright Act 1968* (the **Copyright Act**), which were designed to update Australian copyright law to meet the challenges posed by rapidly advancing digital and communication technologies. The central objective of the amendments was to ensure that copyright law would continue to promote creative endeavour in the online environment, while still allowing reasonable access to copyright material through the use of new technologies.

To implement this objective, there were five key elements to the Digital Agenda reforms:

- The introduction of a broadly-based, technology-neutral right of communication to the public, which replaced and extended the previous technology specific broadcasting and cable-diffusion rights.
- The updating and appropriate extension into the digital environment of key exceptions in the Copyright Act, including the "fair dealing" exceptions and certain statutory licences.
- The introduction of new enforcement measures for copyright owners, covering devices designed to circumvent technological protection measures, electronic rights management information and broadcast decoding devices.
- The introduction of provisions designed to limit and clarify the liability of carriers and carriage service providers, including internet service providers (**ISPs**), for third party copyright infringements.
- The introduction of a new statutory licence scheme for the retransmission of free-to-air broadcasts, which provides remuneration to the underlying owners of copyright in works and other subject matter included in the broadcasts.

The Review

Because of the rapid pace of technological change, and the fact that online business models were still in the relatively early stages of their evolution, the Government acknowledged that the Digital Agenda Act was in some areas "entering uncharted waters". For this reason, it undertook to review the legislative reforms within three years of their commencement.

In April 2003, the Attorney-General, the Hon. Daryl Williams AM QC MP, announced that an external consultant, law firm Phillips Fox, had been appointed to analyse certain key aspects of the Digital Agenda Act and related legislative reforms (the **Review**). Since then, the consultant has undertaken research and engaged

in discussions with stakeholders in relation to the economic impact of the reforms and technological advancements. Information about the Review, including the Terms of Reference, can be found on the Attorney-General's Department website at http://www.ag.gov.au.

On 1 August 2003, the consultant released four issues papers to commence the public consultation phase of the Review. During August and September, the consultant held public forums in Melbourne and Sydney, as well as an online discussion forum, to seek the views of interested parties on the issues papers. The deadline for making submissions to the Review is 30 September 2003.

The four issues papers cover:

- libraries, archives and educational copying (including the operation of the educational statutory licences);
- liability of carriers and carriage service providers, such as ISPs (including issues of authorisation of infringement);
- circumvention devices and services, technological protection measures (including broadcast decoding devices) and rights management information; and
- technology and rights issues.

The issues papers, along with guidelines for submissions, are available from the consultant's website at http://www.phillipsfox.com/whats_on/Australia/DigitalAgenda/DigitalAgenda.asp.

The Issues

The issues papers released by the consultant traverse a wide range of issues, covering most areas of the Digital Agenda Act. Different interest groups will obviously focus on particular areas of key concern to them. Some of the issues that are expected to be especially contentious include the following:

ISP liability

The Digital Agenda Act was intended to clarify and limit the liability of ISPs for copyright infringements that are committed using their facilities. This was to be achieved by providing that:

- an ISP is only *directly* liable for an infringing communication where it determines the content of the communication;
- a temporary reproduction of copyright material made as part of the technical process of making or receiving a non-infringing communication does not infringe copyright in that material;
- an ISP is not taken to have *authorised* an infringement "merely because" it provides the facilities that are used to commit the infringement; and
- the question of whether an ISP (or anyone else) has authorised an infringement is to be determined having regard to a number of factors, including whether the ISP complied with any relevant industry code of practice.

The absence of any judicial consideration of these provisions since the passage of the Digital Agenda Act means that there is still some uncertainty in practice about the circumstances in which ISPs will or will not be liable for third party copyright infringement. Much of this uncertainty arises from the failure of the Digital Agenda Act to specify what sort of conduct (ranging from simple routing of an infringing communication through to hosting of infringing material) might fall within the "mere provision of facilities" and "temporary reproduction" exceptions, or to spell out the content and nature of relevant industry codes, and the specific consequences of complying with them.

An added impetus for clarification of this uncertainty comes from the negotiations currently underway between Australia and the United States in relation to a Free Trade Agreement (**FTA**). The US is expected to argue, as it has in recent FTA negotiations with Chile and Singapore, that Australia should implement detailed "safe harbors" for ISPs, much like those found in the 1998 US *Digital Millennium Copyright Act* (the **DMCA**). These "zones of immunity" provide complete protection against copyright infringement for ISPs that comply with the very specific conditions set out in the DMCA. These include obligations to "take down" infringing material in response to notices issued by copyright owners, and to identify infringing subscribers in accordance with subpoenas issued at the request of copyright owners.

However, the DMCA safe harbors are highly technology-specific and inflexible in their application, and risk being rendered obsolete by future developments in digital and communications technologies. They have also proven themselves to be just as capable of generating litigation, as is evidenced by the recent Verizon case and the decision of Pacific Bell Internet Services (a major US ISP) to challenge a large number of subpoenas issued by copyright owners. The same underlying objectives may be better served by ensuring that a workable and flexible code of practice is formulated and agreed by the Internet and copyright industries, and that the consequences of compliance with such a code are more clearly addressed.

Circumvention of technological protection measures

The Digital Agenda Act introduced a range of new enforcement measures, including provisions imposing civil and criminal liability in respect of the manufacture, distribution and importation of, and other commercial dealings in, devices and services designed to circumvent technological protection measures applied to material by copyright owners. However, the Government stopped short of prohibiting the act of circumvention itself, arguing that this would represent an unreasonable intrusion into the private sphere. This left Australian copyright law out of step with that of our major trading partners, particularly the US and Europe. In another departure from overseas models, the Government also sought to ensure that the operation of fair dealing and other exceptions in the Copyright Act could not be effectively over-ridden by "locking" copyright material.

There were also debates during the passage of the Digital Agenda Act about the appropriate scope of the definition of "technological protection measure". Unlike in the US, the definition in Australia does not cover all blanket access control measures – a measure must be designed to "prevent or inhibit" copyright infringement in order to attract the protection of the Copyright Act. It was unclear where this left dual purpose measures, such as DVD region controls. However, in the recent *Sony v Stevens* case[1], as well as taking a broad view of what was required to establish that a measure "prevents or inhibits" copyright infringement, the Full Federal Court clarified that so long as a measure serves a copyright protective purpose, the fact that it has another purpose does not take it outside the definition of "technological protection measure". This decision has attracted criticism from the Australian Competition and Consumer Commission and is likely to be a key focus of the Review.

In this area, the Australia-US FTA negotiations will also influence the policy debate, with the US expected to push for bans on both the act of circumvention and the use of circumvention devices and services, to match those in the DMCA.

Corporate libraries

Although not really a "digital" issue, when it was first introduced to Parliament, the Digital Agenda Bill contained a definition of "library" that excluded libraries operated by for-profit organisations, such as corporations and law firms. The effect of the definition would have been to prevent such organisations from relying on the libraries and archives exceptions in the Copyright Act. This was supported by copyright owners, who argued that profit-making organisations should have to pay for their use of copyright material. However, the definition was strongly opposed by user interests, particularly representatives of libraries and educational institutions, who claimed that effectively excluding for-profit libraries from the inter-library loan network would restrict public access to the often highly specialised collections maintained by those libraries.

The Government agreed to remove the definition, but only on the understanding that the issue would be re-considered as part of the Review. The Government has made it clear that it expects the affected interests to provide evidence about the economic impact of the inclusion or exclusion of for-profit libraries from the definition.

[1] *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 (30 July 2003)

New anti-"spam" initiatives

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Introduction

On 23 July 2003, the Minister for Communications and Information Technology, Senator Richard Alston, announced the federal government's intention to introduce legislation to ban email "spam". While the legislation will be some time in the making, this announcement marks a timely opportunity to reflect on the current and potential future regulation of marketing through electronic media.

A key point to note is that the current and proposed prohibitions seek to distinguish between unsolicited spam and legitimate marketing activities. In essence, marketing which is requested, consented to or within persons' reasonable expectations or within an existing business relationship should remain permissible. The government has indicated an intention to develop a practical system which permits legitimate marketing but prohibits harassment.

"Spam"

The term "spam" is used for unsolicited electronic marketing or electronic "junk mail" and is readily associated with pornography, scams and black markets. While spam is most frequently used in the context of unwanted advertising e-mail, it is increasingly applied to marketing received via short message service (SMS) and other wireless marketing technologies (such as wireless applied protocol (WAP), multi-media message service (MMS) and third generation technology (3G)).

E-mail spam is still the most prevalent form of spam given its low cost, the ability to include more information in each message and the viability of global internet commerce. However SMS spam is on the rise, particularly with the introduction of bulk discount and web-based SMS generating products. Accordingly, both e-mail spam and SMS spam have attracted recent regulatory attention.

The vice of spam

It is the intrusive nature of spam that arouses concern. Although some traditional forms of paper marketing are dubbed "junk mail", when unwelcome ultimately these materials can be easily disposed of and even recycled. In contrast, electronic spam has been said to threaten the very future of e-mail and SMS as legitimate forms of communication. Electronic spam takes up data usage allowances, which are considerably limited in the case of SMS. Electronic spam is time consuming to delete and invades valuable business hours. Further, there is something intrinsically personal about receiving a message sent to an e-mail address or mobile