

- police will be able to issue "on-the-spot" fines for acts of piracy;
- changes will be made to make it easier for copyright owners to prove copyright ownership and subsistence of copyright (eg, for films, the worldwide labelling practices of commercially-released films will be recognised);
- the Courts will be given power to award higher damages and other remedies for large scale piracy (such as that which occurs on the Internet) without the need for copyright owners to establish each individual act of copyright infringement;
- the right of a copyright owner to commence civil infringement proceedings in response to unauthorised electronic reproduction of copyright works will be confirmed;
- a broader range of offences under the Copyright Act will apply in relation to Pay TV piracy;
- research will be undertaken to identify the nature and extent of piracy and counterfeiting in Australia; and
- industry initiatives will be implemented to raise the profile of copyright enforcement issues.

### Circumvention of Technological Protection Measures

The changes proposed by the Government do not, at this stage, deal with Australia's obligations under the Australia-US Free Trade Agreement in relation to circumvention of technological protection measures. This issue is still being considered by the

Government and will be dealt with under separate legislation, proposed to be released later this year.

### Implications of the Proposed Changes

While the Government has proposed changes that will broaden the exceptions to copyright infringement for certain acts by certain groups, at the same time, it has proposed significant changes that will assist copyright owners in reducing and preventing piracy. Of course, the exact scope and effectiveness of the changes will not be known until the Bill implementing these changes has been released for public review and comment.

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# Digital Content Distribution in the Asia Pacific Region

Nick Abrahams and Trent Lyndon look at the issues confronted by US content vendors entering into new markets in Asia Pacific countries

## Introduction

Consider the hypothetical scenario of a US vendor wishing to sell music and video content over the Internet to consumers located in the Asia Pacific region. What are the high level considerations for vendors of this kind that seek new markets in the Asia Pacific, distributing products electronically over the Internet? Is there a uniform approach to regulating this type of trading activity within the Asia Pacific region, and how is this regulation enforced?

Take the cases of Australia, China, Indonesia, Malaysia and Thailand. While there is some uniformity in approach, a high level analysis of these jurisdictions demonstrates that they have varying approaches to regulation, demonstrating the need for detailed guidance and assistance by qualified counsel resident in those jurisdictions. Consider the following questions that may be asked by the US vendor in order to obtain a high level overview of the regulatory framework and to assess its ability to expand into these jurisdictions:

## Prohibited content

Are there restrictions on the type of content that can be provided over the Internet?

### Australia

Australia has implemented national laws that attempt to prevent the online publication of illegal and offensive content. *The Broadcasting Services Amendment (Online Services) Act 1999* (Cth) amended and inserted into the *Broadcasting Services Act 1992* (Cth), certain provisions designed to prevent the publication of illegal and offensive online content. This is achieved through the establishment of a regulatory regime that applies to Internet Service Providers and Internet Content Hosts, requiring them to block or take down offending content. This, taken together with other laws that would apply to the content providers themselves, means that there are broad based restrictions on illegal and offensive online content in Australia.

### China

China has implemented laws to prevent restricted content being provided over the Internet. Restricted content includes content that opposes fundamental principles determined in the Constitution, compromises state security, harms the dignity or interests of the State, incites ethnic hatred or racial discrimination, sabotages State religious policy or propagates heretical teachings or

feudal superstitions, disseminates rumors, disturbs social orders or disrupts social stability, propagates obscenity, pornography, gambling, violence, insults or slanders a third party, infringes on the lawful rights and interests of a third party, or includes other content prohibited by laws or administrative regulations.

### Indonesia

There are no laws specific to Internet content as such, but the general law would need to be complied with, which strictly prohibits, for example, the promotion of gambling, alcohol and pornography.

### Malaysia

There are several restrictions that the US vendor will have to consider. These include restrictions under the Malaysian *Communications and Multimedia Act 1998* (CMA).

The US vendor may be considered a content applications service provider (CASP) within the scope of the CMA. Under the CMA, a CASP is a person who provides a content applications service such as satellite broadcasting subscription, broadcasting terrestrial free to air, television terrestrial radio broadcasting, internet content applications services, or online publishing and information services. The CMA also provides that no CASP or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy,

abuse, threaten or harass any person. The Malaysian Communications and Multimedia Commission (**MCMC**) is empowered to prosecute offenders of these regulations.

It should be noted a voluntary Content Code has also been registered with the MCMC by the Content Forum to further regulate the types of content that can be provided. By virtue of it being a voluntary Code, its objectives and principles are upheld by forum members and those who have submitted their agreement to subscribe to it. Upon finding a Content Code breach, the Complaints Bureau set up by the Content Forum is empowered to issue a written reprimand, impose a fine not exceeding fifty thousand ringgit (RM50,000) and/or require removal of the content or cessation of the offending act. Further, pursuant to the CMA, the MCMC may direct a person or class of persons to comply with the Content Code. A person who fails to comply with such a direction by the MCMC shall be liable to pay to the MCMC a fine not exceeding two hundred thousand ringgit (RM200,000).

The Films (*Censorship*) Act 1976 applies to material which comes within the definition of "film". It is an offence to exhibit a film without a valid censorship certificate. It is also an offence to publish, distribute or display publicity material about a film that has not been approved by the Board of Film Censors.

The Penal Code also provides that it is an offence to distribute, publicly exhibit or put into circulation any obscene drawing, painting, representation, or object. It is also an offence for a person to take part in or receive profits from any business in the course of which he knows or has reason to believe that obscene objects are conveyed, publicly exhibited or put into circulation, or to make or publish defamatory statements or representations with intent to harm. There are also various laws that apply to the publishing or importation of seditious or subversive materials and the communication of official secrets.

### *Thailand*

The Ministry of Information and Communications Technology (**ICT**) and the High-Tech Center of the Thai Royal Police can, in practice, require ISPs to block access to certain sites. Typically, this occurs where a site contains content that is considered obscene or offensive to Thai public morality. The ICT is currently monitoring the web in a project called "cyberclean" to identify sites offensive to Thai values or morality. Content that would be permitted in the US is often deemed offensive by Thai authorities. Sites discussing sensitive issues in Thailand (generally described as "national

security" issues), sites that can be used for gambling, and sites having content pertaining to pornography or prostitution are often blocked.

## **Digital Rights Management**

Are there any laws which prohibit the circumvention of digital rights management software that may be attached to content?

### *Australia*

Australia has implemented amendments to the *Copyright Act 1968* (Cth) which regulate dealings with devices designed to circumvent technological protection measures that are used to prevent the infringement of copyright. These amendments also prohibit the unauthorised removal of electronic rights management information from works and also prohibit dealings in works which have had electronic rights management information removed without authority.

### *China*

China has recently implemented regulations on Internet copyright protection, effective as from 1 July 2006. The *Regulations on the Protection of the Right of Communication through Information Network* prohibit people from intentionally destroying technological measures used by copyright owners to restrict others from viewing or using their works, and also prohibit people from assisting others to do the same.

### *Malaysia*

There are no laws that deal specifically with digital rights management as such in Malaysia. However, possible grounds for preventing the circumvention of digital rights management software under general Malaysian law would include for (i) breach of contract if DRM restrictions form terms of the licensing agreement; (ii) breach of copyright law if there is unauthorised modification of the software; and (iii) breach of the *Computer Crimes Act 1997*, under which it is an offence for any person to cause any computer to perform any function with intent to secure unauthorised access to computer material (such as hacking).

### *Thailand*

Thailand does not have laws that specifically prohibit the circumvention technological protection measures within a copyright work, but if there was a provision within the clickwrap agreement prohibiting parties from taking such action, it would theoretically be enforceable as a matter of contract, unless the provision was contrary to the Thai *Unfair Contracts Act* or *Consumer*

*Protection Act* (there is no precedent yet on this issue). In practice, however, it would be very difficult to enforce such a provision because of the problems associated with enforcing clickwrap agreements (discussed below) and intellectual property rights generally in Thailand.

## **Clickwrap agreements**

Are "clickwrap agreements" enforceable in these jurisdictions?

### *Australia*

Clickwrap and other forms of online agreements are capable of being enforced in Australia provided that the relevant terms of those agreements satisfy the general requirements for incorporation, namely that the accepting party is deemed to have accepted those terms. The *Electronic Transactions Act 1999* (Cth) also supports the enforceability of online contracts by providing that, for the purposes of a law of the Commonwealth, a transaction will not be considered to be invalid merely because it took place by way of electronic communications.

### *China*

Agreements of this kind would be viewed as standard clauses formulated in advance for repeated use and without prior negotiations with the other party. Agreements of this kind are enforceable, subject to principles of fairness.

### *Indonesia*

Clickwrap agreements are not enforceable in Indonesia as the rules on civil procedure prohibit the submission of electronic evidence. A new *Law on Information and Electronic Transactions* was recently proposed, but is yet to pass into law. It is anticipated that this law will deal with the enforceability of electronic transactions.

### *Malaysia*

Such agreements are enforceable under Malaysian law provided the standard issue of having brought the terms of the contract to the attention of the consumer at the time of contract has been satisfied.

### *Thailand*

In theory these agreements are generally considered to be enforceable, but in practice it can be difficult for the party seeking enforcement to provide adequate proof that the parties have contracted. The practical evidentiary problems associated with producing such proof are formidable in Thailand. In addition, Thai law specifically prohibits the use of clickwrap agreements for certain kinds of contracts, and the law

on this issue still evolving.

## Enforceability of Californian governing law

Would a court in these jurisdictions give effect to a clause in an online contract specifying that Californian law was to govern, even though consumers were locally based?

### *Australia*

While the parties to an online contract may agree that Californian law is deemed to govern the relationship, the enforceability of this clause, were proceedings to be validly commenced in the Australian courts, will be determined by the choice of law rules that apply to the particular area of law involved in the controversy. As an example, where the proceedings involve an action for defamation, recent uniform Australian legislation provides that the applicable law to the proceedings is to be the law of the jurisdiction with which the harm occasioned by a publication of matter has its closest connection.

### *China*

Parties are permitted to agree that foreign law will govern a contract where one party to the contract is a foreign party. In this instance however, the US vendor would not be entitled under Chinese law to offer services directly to Chinese consumers due to restrictions on foreign participation in the Internet content market. The US vendor would be required to offer those services through a domestic Chinese company and the contract would therefore be between Chinese parties. As such, the parties would not be entitled to agree to be bound by Californian law.

### *Indonesia*

The parties would technically be entitled to agree to Californian law as the governing law, although difficulties with the enforceability of online contracts (discussed above) remain. In practice, even were the issues with the enforceability of online contracts to be overcome, there have been instances where the Indonesian Judiciary have ignored choice of foreign law provisions and have applied Indonesian law. It is therefore not certain that an agreement to apply Californian law would be upheld by the Indonesian courts.

### *Malaysia*

Generally, the Malaysian courts would give effect to clauses prescribing Californian law as the law of the content supply contract. Exceptions include where the choice of law is used to perpetrate fraud or avoid an ille-

gality.

### *Thailand*

Thailand will enforce choice of law provisions unless contrary to public morals or policy (but the public policy exception is often interpreted more broadly in Thailand than in the US).

## Difficulties with enforceability

Would the US vendor have any problems enforcing the agreement terms against a local consumer?

### *Australia*

For the purposes of this question, it is initially assumed that the US vendor has been successful in obtaining judgment against the local consumer in a Californian court. The *Foreign Judgments Act 1991*(Cth) allows the enforcement of foreign judgments by registration of those judgments in the applicable Australian court. Only those jurisdictions that have reciprocal arrangements with Australia, however, are recognised under the Act. As Australia has no reciprocal arrangement with the United States, a Californian judgment would not be registerable in Australian courts pursuant to this Act, but the US vendor would still be entitled to seek to have the judgment recognized and enforced in Australia under common law principles.

If the US vendor was successful in obtaining a local judgment against the local consumer, whether through originating the initial proceedings in the local jurisdiction or having a foreign judgment enforced locally, then there are no specific additional problems that would need to be overcome by that US vendor solely by reason that the transaction was undertaken online.

### *China*

In order to enter the Chinese market, the US vendor would need to enter into arrangements with a local Chinese agent, and provide the services through that agent. The Chinese agent would be required to obtain government approval to be permitted to distribute foreign material. As the Chinese agent will be distributing the material and entering into agreements with local consumers, it would then be open to the Chinese agent to recover payments and to enforce the agreement terms against local consumers in the ordinary course under Chinese law.

### *Indonesia*

Foreign court judgments are not enforceable in Indonesia unless a reciprocal

enforcement treaty exists between Indonesia and the country in which the foreign judgment is handed down. No treaties of this kind are currently in force. Foreign arbitral awards are enforceable in Indonesia provided that the country in which the arbitral award was handed down is also a party to the *New York Convention on Reciprocal Enforcement of Arbitral Awards (New York Convention)*.

In practice, foreign arbitral awards are most likely to be enforceable where the agreement in question is governed by Indonesian law. Best practice would currently be to provide that customer agreements are governed by Indonesian law and that disputes be subject to arbitration in Indonesia pursuant to the Rules of the Indonesian National Arbitration Board. Where this is the case, it would be open to the US vendor to seek to directly enforce the agreement terms against local consumers in the ordinary course.

### *Malaysia*

The US vendor may seek to enforce the agreement by way of a court action through the Malaysian courts. Alternatively, if a foreign judgment has been obtained in the US, the US vendor may, as judgment creditor, sue on the foreign judgment in Malaysia by treating the judgment as a debt due. However, in order to do so, the judgment must be a final judgment and not an interlocutory judgment; and where the claim is *in personam*, the judgment must have been for a liquidated sum. The foreign judgment will not be enforced in Malaysia if it was obtained by fraud, was obtained in breach of the principles of natural justice or is against public policy as determined under Malaysian law.

Foreign arbitral proceedings may be enforced in Malaysia if obtained from a member jurisdiction of the New York Convention. Such an arbitral award will be enforceable by Malaysian courts without going into the merits of the award.

### *Thailand*

Thailand will not enforce foreign judgments; nor will Thailand enforce forum selection clauses (clauses providing that a dispute must be heard in a particular court.) Because Thailand will not enforce either foreign judgments or forum selection clauses, and forum selection clauses and foreign judgments (pursuant to the *Uniform Foreign Money Judgments Recognition Act*, which does not contain a reciprocity clause and has been adopted by many U.S. states) are often enforceable in the U.S., a forum selection clause can often provide an asymmetrical tactical advantage

to a Thai party (with assets only in Thailand) if a dispute arises out of an agreement containing a forum selection clause. This tactical advantage is counterintuitive and often only becomes apparent during pre-trial settlement negotiations (where most disputes are resolved) when both parties have claims (real, imagined or something in between) against each other. Foreign arbitral awards are enforceable in Thailand, subject to difficulties with the practical implementation of those awards that are discussed below.

## Taxation

What would be the US vendor's tax liabilities in the particular jurisdiction?

### *Australia*

Payments made by Australian customers for the right to download music and video content may be royalty payments, depending on the type of right / licence provided to the customer. If the payment is a royalty that is sourced in Australia, then the Australian payer will be required to withhold from the payment and remit to the Australian Taxation Office royalty withholding tax of 5%.

In certain circumstances, the supply of things other than goods and real property (eg. rights and licences) to customers in Australia may be liable to GST in Australia, if the agreement is made in Australia and/or the rights / licence is used in Australia. If this is the case, there is the ability for the overseas supplier to have the Australian customer remit the GST on its behalf provided a number of requirements, including that the recipient is registered for GST, are satisfied.

### *China*

Technically, the revenues of a foreign vendor in China would be subject to 10% withholding tax and 5% business tax. There would, however, assuming that a US vendor could enter into online agreements directly with Chinese consumers, be significant issues with enforcing the payment of tax where the vendor is foreign and contracts are made and fulfilled online.

### *Malaysia*

Liability for the payment of Malaysian tax by non-residents will arise only where there are deemed to be Malaysian sources of income and only where their activities constitute "trading in" Malaysia. What constitutes "trading in" Malaysia is a question of fact having regard to, amongst other things, whether there has been fulfillment of contractual obligations, deployment and use of assets and facilities and the performance of core operations of business in Malaysia. In the case of a non-resident company having

business operations outside Malaysia and selling intangible products into Malaysia through a website hosted outside Malaysia, there is unlikely to be tax payable on business income as the activities are unlikely to constitute "trading in" Malaysia. This scenario is also unlikely to give rise to there being a permanent establishment in Malaysia for double taxation treaty purposes.

If, however, payment is expected in Malaysia from a resident or business as consideration for the use or the right to use digital products or for provision of services, then withholding tax may be imposed. Under the withholding tax method, the payer is under a legal obligation to withhold tax at the appropriate rate from all payments falling within the deeming provisions made to the non-resident recipients.

Section 107A of the *Malaysian Income Tax Act (MITA)* deals with contract payments made to a non-resident contractor in respect of services under a contract. The withholding tax provision is only applicable to the service portion of the contract payments. 'Services under a contract' means the performing or rendering of any work or professional service in Malaysia, being work or professional service in connection with any contract project carried out in Malaysia. Withholding tax is only applicable to services performed in Malaysia or in connection with services performed in Malaysia. The payer is required to deduct tax at the rate of 15% of the contract payment on account of tax which is payable by the non-resident contractor for any year of assessment; and 5 % of the contract payment on account of tax which is payable by employees of the non-resident contractor for any year of assessment.

Section 109 of the MITA, which deals with interest and royalty paid to a non-resident person (including a company), provides that the rate of withholding tax is 15% in the case of interest paid to a non resident person and 10% in the case of royalty payments.

### *Thailand*

VAT would be payable on the supply made by the US vendor and in theory would need to be paid by the Thai consumer. Where the US vendor fails to collect VAT, the Thai consumer would be obliged to withhold VAT and tax and remit the withheld funds to the Thai Revenue Department. This rarely happens in practice and VAT is usually only collected where physical items are delivered into Thailand and the product is the subject of an inspection by the Thai Customs Department, in which case customs tariffs and VAT will be levied against the goods. Where the goods are delivered electronically however, VAT is often not paid. This

can create problems for products provided to businesses if a Thai business intends to treat the money it pays for the product as a legitimate business expense. If that customer is audited, the revenue authorities may seek evidence that VAT was paid, and if the customer cannot provide such evidence, the revenue authorities will probably not only seek the payment of VAT, surcharges, and penalties for failing to pay VAT, but will also refuse to recognise the expenditure as deductible business expense.

## Privacy issues

Are there any privacy obligations applicable to the US vendor when it collects personal and financial information on people resident in the particular jurisdiction?

### *Australia*

*The Privacy Act 1988* applies 10 national privacy principles to private sector organisations. These principles cover such things as collection, use and disclosure, data quality, data security, openness, access and correction, identifiers, anonymity, trans-border data flows and sensitive information. To the extent that the US vendor had a presence in Australia or was otherwise subject to Australian laws, it would need to comply with these principles in its collection and use of the personal information of persons within Australia.

### *China*

Assuming that a Chinese agent is appointed to sell the US vendor's product in China, the Chinese agent has a legal obligation under Chinese law not to release personal information of customers to any third party unless customer approval is obtained.

### *Indonesia*

There are no specific privacy laws currently in force in Indonesia despite the fact that there has been some discussion over the introduction of privacy laws for some years.

### *Malaysia*

Malaysia does not currently have any privacy laws. However, a privacy law is being developed and is expected to be out by 2007.

### *Thailand*

Thailand has proposed a draft *Data Protection Act* which is largely based on the EU model law. Section 324 of the Thai *Penal Code* also more generally prohibits the wrongful disclosure of confidential information and, in some circumstances, would be applicable to information provided over the Internet.

## Alternative dispute resolution

Are alternative dispute resolution options available to be included in the agreement with local consumers?

### *Australia*

Alternative dispute resolution is commonly used in Agreements in Australia and, subject to issues concerning the enforceability of an award or judgment as against Australian consumers discussed earlier, there would be few impediments to the use of these provisions in agreements with Australian consumers.

### *China*

Alternate dispute resolution is an option in China, and the US vendor or its local Chinese agent may choose to utilise the services of one of the Chinese arbitration institutions. China is also developing online dispute resolution although this is still at the initial development stage.

### *Indonesia*

As discussed above, foreign arbitral awards are enforceable in Indonesia where the country in which the award was handed down is also a party to the New York Convention, the award does not contravene national order and the District Court has provided an execution order in relation to the award. The District Court is more likely to provide an execution order where the agreement in question is governed by Indonesian law. However, following a recent case involving Pertamina, a state owned oil and gas company and Karaha, a local power producer, in which the District Court overruled the decision of a Swiss arbitration panel, the enforcement of foreign arbitral awards has become more uncertain. One alternative that has met with increased popularity since this decision is to provide for the arbitration of disputes in Indonesia pursuant to the rules of the Indonesian National Arbitration Board.

### *Malaysia*

Arbitration is a common alternative if a foreign vendor is located in a member jurisdiction of the New York Convention. Such an arbitral award will be enforceable by Malaysian courts without going into the merits of the award.

### *Thailand*

Thailand is a party to the New York Convention, and foreign arbitral awards are enforceable in Thailand. However, the practical implementation of such clauses can be problematic, particularly if the arbitration

clause does not address various other issues that arise under Thai law.

## Local consumer protection laws

Are there local consumer protection laws that must be complied with?

### *Australia*

There are various consumer protection laws that apply to consumer transactions in Australia, provided predominantly pursuant to Part V of the *Trade Practices Act 1974* (Cth) (TPA). The TPA operates so as to prohibit a corporation from engaging in misleading or deceptive conduct and from engaging in activity that is likely to mislead or deceive. It also operates to imply certain conditions and warranties into consumer contracts. However, if the US vendor is contracting to provide goods and services under an online contract that is governed by Californian law, the contract is deemed to have been made in the US and the US vendor is located in the US, then these provisions of the TPA will not apply as the conduct in question will not have taken place in Australia. This is because the contract will most likely be deemed to have been formed in the US and, without more, the US vendor is unlikely to be viewed as having carried on business in Australia.

### *China*

China has laws in place relating to Internet safety and protection which include safeguarding users' personal data. Notices have also been issued by local administration of industry and commerce regarding the lawful rights and interests of consumers online. China also has in place general consumer protection legislation to protect consumers against unfair or unreasonable standard contracts and against misleading advertising. Business entities must ensure that the products provided by them have the quality, functions, uses, and date of expiry that they should have during the normal use of such products, except where the consumer is already aware of the existence of defects before the purchase such products. As the contract for the supply of the US vendor's goods and services is likely to be through a local Chinese agent, these laws would apply to the sale of those goods and services.

### *Indonesia*

Indonesia introduced new consumer protection laws in 2000, which set out the basic rights of consumers and the obligations of business entities with respect to the sale of products and services in Indonesia. In order to comply with the law, products must have a label that sets out, amongst

other things, directions for use and the name and address of the applicable business entity. These labels must be in the Indonesian language. Business entities are prohibited from providing false or misleading information to consumers and from using certain disclaimer clauses in sale and purchase contracts. Business entities are also required to guarantee their products based upon prevailing quality standards.

In practice these laws will not impact upon the US vendor as they will be unenforceable against it in circumstances where it has no presence or assets in Indonesia.

### *Malaysia*

The Malaysian *Consumer Protection Act* currently excludes electronic transactions from its ambit. However, the Government has recently stated this Act and other relevant laws would also be amended to ensure consumer rights are protected in e-commerce transactions.

### *Thailand*

Thailand has implemented general consumer protection legislation in the form of an Unfair Contract Terms Act law and the Consumer Protection Act. Thailand also has specific laws regulating drugs, food, cosmetics and hazardous substances, which are potentially applicable to sites offering to sell products that are subject to regulation.

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