

Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

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2009, A Turning Point

Shane Barber, the President of the Communications and Media Law Association, looks back on the year that was.

There can be little doubt that 2009 will be considered a watershed year for those of us who practise law in the communications and media sectors. The life of the Communications and Media Law Association (**CAMLA**) this year reflects the enormous challenges and opportunities the industries we serve now face.

CAMLA's year started with a presentation from the Minister for Broadband, Communications and the Digital Economy, The Hon. Senator Stephen Conroy. The Minister advised a packed audience that the government had, at that point, not yet made any decision in relation to its broadband initiative. Less than a week later, the government shocked many in the industry with its announcement that it would go it alone in building its National Broadband Network (**NBN**).

Much media space has since been devoted to an analysis of the government's NBN proposal, and subsequently its proposed legislation in relation to Telstra's network separation. By the end of the year, many were focusing on the long term consequences of the NBN for content providers and for communications and media regulation generally. Indeed that was where CAMLA finished its year, with a panel discussion regarding the implications for intellectual property rights and communications and media regulation arising from a ubiquitous high speed broadband network and ever changing delivery technology.

2010 will no doubt see the completion of parliamentary consideration of the Telstra network separation bill, rather presumptuously called the *Competition and Consumer Safeguards Bill*, along with considerable proposals for telecommunications regulatory change to reflect the new environment. Equally as important, if not more so, is the government's projected review of the *Broadcasting Services Act* in 2011 which many argue will not occur soon enough.

As we see a rapid move from old delivery mechanisms to new ones, there are a number of key themes which are emerging and on which many commentators have spoken in 2009. These include the following:

1. Owners v Consumers

A common criticism levelled at much of the current media legislative regime in Australia is the perception that it is focused more on protecting the interests of operators, often in the guise of the "national interest", than reflecting the reality of new delivery mechanisms and the interests of consumers.

Already it appears that much of the foreign ownership debate which has consumed most of the last two decades is now all but academic. It now seems very odd to us that so much effort was spent in regulating foreign ownership of television and newspapers to ensure balance and reflection of our national character, when we increasingly see the first point of call for news and information being the internet where content is produced by persons whose identity and motives are often not known at all.

2. Monetising Content

Proprietors of old media platforms such as newspapers now confront a significant dilemma as sales of product and advertising space diminish. Up to now, online versions of newspapers have often been used as a complement, although an increasingly important one, to hard copy publications with monetisation occurring largely through clicks on advertising placed on the proprietors' sites. Increasingly sophisticated technology aimed at generating click revenue by choosing and personalising advertising content to match the characteristics of the reader, as revealed by their searching patterns, does not appear to be the complete online monetisation solution.

This year, we have seen some newspapers become wholly online affairs. We have also seen one of the world's most significant newspaper proprietors indicate that it is now time for readers to pay directly for online content.

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The Challenge of Outsourcing in the Current Economic Climate

Peter Mulligan and Carrie Neal discuss recent developments in outsourcing and some considerations that should be taken into account in outsourcing agreements.

ACMA v 2UE and the Public Interest

The Australian Communications and Media Authority applied to the Federal Court in November 2008 for orders that Radio 2UE Sydney Pty Ltd pay civil penalties for contraventions of the Broadcasting Services Act 1992 (Cth). The Communications Law Centre intervened in the case in order to make submissions in the public interest. In this article, Professor Michael Fraser, Director of the Communications Law Centre, and Matt Vitins provide a summary of the decision and the submissions made by the CLC.

Switching Channels and Changing Laws: Managing the Radiofrequency Spectrum

Valeska Bloch reviews the regulation and management of spectrum in Australia, before outlining some fast approaching policy questions that will emerge from the digital dividend, the expiry of current spectrum licences and the National Broadband Network.

The Trafigura Super-Injunction

Natalie Buck discusses the Trafigura 'super-injunction' episode in the UK, the role Twitter played in undoing the injunction and whether such injunctions are ever appropriate.

Next Generation Broadband Regulation: NBN Co. and the Government's New Role in the Market

Kelvin Liew considers the potential of the NBN to address ongoing competition issues in telecommunications. This essay won the 2009 CAMLA essay competition.

No Free Kicks: Copyright in the Sporting Arena

The Senate Standing Committee on Environment, Communications and the Arts conducted an inquiry into the reporting of sports news and the emergence of digital media earlier this year. In this article, Victoria Wark considers the report of the Senate Inquiry and some of the arguments made for and against providing further protections for sporting events under the Copyright Act.

While many have surmised that appropriately priced access to content will not be as confronting to a growing number of online dependent readers as first thought, a space to watch in 2010 will be the tussle for dominance between providers of solutions for efficient micro payment.

3. Copyright is Dead

This provocative proposition was put by members of the panel at the final CAMLA Seminar in 2009. While many in the audience disagreed, it is clear that the utility of copyright now faces a significant challenge in the online environment, particularly in one enhanced by a NBN.

Litigation continues around the world in relation to the protection of interests in copyright, including some high profile litigation in Australia. Interestingly, copyright owners appear to be moving from low profile individuals to the deeper pockets of high profile internet service providers in their quest to protect their rights.

It was clear from the discussion between academics, legal professionals and industry representatives at our panel seminar that a widely accepted alternative solution to copyright is yet to emerge.

4. Fixed v Mobile

As the year progressed and the Commonwealth Government developed its plan for a fixed line NBN, early indications were that Telstra was seeing its future increasingly in the provision of mobile services.

During a recent presentation, representatives of the Australian Communications and Media Authority noted that consumers in the under 25 years age group are now predominantly mobile only consumers, with those in the 25 to 35 years age bracket tending towards mobile access to the internet rather than via a fixed line. Those in the 35 to

55 years age group represent a "partial substitution" between fixed and mobile solutions.

This represents a number of challenges for industry, governments and regulators. Where does the government and the regulator position future legislative and regulatory focus on the internet given the divergent consumer use of communications services? Is the significant investment in a fixed line NBN really the appropriate strategy after all? Is the prospect of abundant fixed line capacity quantitatively different from the internet as we know it today?

5. Back to the Future

A sleeping issue has to be the rollout of a significant part of the proposed NBN aerially.

Those of us involved in aerial network rollouts in the 1990s know how confronting this is to the community at a time when it wishes to see the beautification of its environment and increasingly the delivery of its communications and media by mobile or wireless means. There will no doubt be some consternation when the community begins to see a thick black cable being hitched up on poles out of their front windows. It seems incongruous to many that in the 21st century we are still employing a "Burke and Wills" technology such as overhead cabling.

All of these challenges lie ahead of us. In the meantime, from all of us at CAMLA, we hope you enjoy a safe happy holiday season.

Shane Barber is President of the Communications and Media Law Association and Managing Partner of Sydney based communications, technology and media law firm, Truman Hoyle. The views expressed are the author's personal views and not those of CAMLA or Truman Hoyle.