

BOOK REVIEW*

Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet edited by ANNE FITZGERALD, BRIAN FITZGERALD, PETER COOK AND CRISTINA CIFUENTES (Australia: Prospect Media Pty Ltd in association with QANTM Australia CMC Pty Ltd, 1998), pp viii + 188. Recommended retail price \$145.00 (ISBN 1 86316 134 1).

I. INTRODUCTION

On 2 April 1998 the Federal Attorney-General, the Hon Daryl Williams AM QC MP, released the report of his Electronic Commerce Expert Group. The terms of reference for the Group, which had been established in July 1997, basically required the Group to consider whether any new or different laws needed to be passed to enable Australians to engage in electronic commerce with confidence so that Australia would not be disadvantaged compared to the rest of the world.¹

In June 1996 in New York the United Nations Commission on International Trade Law (UNCITRAL) settled the terms of a Model Law on Electronic Commerce. An extensive Guide that outlined the rationale underlying each of the provisions accompanied this document, which had been more than two years in development. The Model Law contained provisions that could be adopted or adapted by each of the members of the United Nations that wished to enact a law to facilitate electronic commerce.

From since Moses was in the bulrushes until only a few years ago the law has assumed that the only thing that could be evidence was in tangible form, and that unless it was the original it was not admissible in evidence. *Going Digital*, described by its publisher as "A Prospect Intelligence Report", covers a range of issues from intellectual property to electronic commerce to liability and privacy issues. It is a marvellous contribution to the legal profession that traditionally,

* Philip N Argy, BCom LLB (UNSW), FACS; Head of the Intellectual Property, Trade Practices and Technology Group at law firm Mallesons Stephen Jaques; National Vice-President of the Australian Computer Society; and Chairman of that Society's Economic, Legal & Social Implications Committee. Member of the Federal Attorney-General's Electronic Commerce Expert Group 1998.

¹ Note that although the Electronic Commerce Expert Group did not include draft legislation in its report, it made recommendations that were formulated with an eye to how legislation might look. I prepared a draft piece of legislation during the Group's recommendations and one version is available for public comment at <<http://www.msj.com.au/argy/ecombill.htm>>.

almost genetically, has been technology averse. This mould certainly does not fit the contributors to *Going Digital*.

If you are a trader and wondering whether to get into e-commerce, you would want to be reasonably confident that your transactions would be enforceable, that you could sue the other side if for example they did not pay. *Going Digital* will leave the trader with a high comfort level that there are lawyers well qualified to ensure Australia reaches its potential, as that ubiquitous 'convergence' results in the whole world moving quickly to adopt and adapt to paperless ways of communicating and trading. Mind you, I still think that the totally paperless law office is about as likely as the paperless toilet, but time will tell. The Attorney-General's Expert Group had to decide whether any law was needed at all and, if so, whether Australia should enact the Model Law without change or with change, or even do something completely different. The Group looked at what other countries around the world had done, and particularly looked at those jurisdictions that had decided to do something different from the Model Law. The review revealed that although many States in the USA had enacted digital signature recognition legislation, for instance, it was almost universally regarded as ineffective and, more importantly, was too technology specific. In fact, most of them assumed the use of asymmetric cryptography for electronic signature mechanisms.

In the Foreword to *Going Digital* Dr Paul Twomey, Chief Executive Officer of the National Office for the Information Economy, notes that the work "illuminates the evolving commercial and legal landscape arising from the transition to an information economy" and supports the view of the Electronic Commerce Expert Group that Australia "does not need a legal revolution to match the technological one". This is an important point and one that the discussion throughout the book reinforces.

As Peter Cook, Project Officer with QANTM Australia CMC Pty Ltd, notes in the Introduction to *Going Digital*, the practical nature of the papers it collates reflects their origins. All but Patrick Gunning's paper on Privacy were presented during a 1997 series of QANTM-sponsored seminars entitled "Going Digital". "Hence, the focus of the presenters is always on bringing their specialist knowledge to bear on practical problems that people were facing in the everyday world."

Confidence comes from knowledge that comes from the availability of information. *Going Digital* provides information to lawyers and students alike so that they can develop confidence in advising the Australian community in this exploding area, and not approach anything remotely technological with the trepidation of their forebears.

II. COPYRIGHT

Andrew Christie's paper on Copyright to some extent reinforces the impact of the popular myth that there is no copyright on the Internet. Indeed his opening suggestion that web site developers should "do what you want to do" because

"whilst technically illegal, the proposed act may not matter to the other person because it may not be causing them damage" is troublesome. Although asserting later that "the author's tongue is only partially in cheek" I am afraid I do not like what Mr Christie is licking at. When he later indicates his view that "a transient storage in computer memory should, as a matter of policy, be considered not to be a reproduction in material form" we well and truly part company. In my view the reproduction in RAM of a substantial part of a computer program must be a reproduction requiring the copyright owner's permission, however transient its storage time. If it does not, then much of the legal basis for current software and information licensing regimes will collapse. It is a very important issue and, having stated that *Going Digital* is a valuable contribution to the literature, I am bound to make an exception for what I regard as a most unhelpful contribution from Mr Christie in the early part of his paper. His subsequent analysis of the copyright consequences of linking and framing adopt a more conventional approach and lead to sensible propositions including that of implied licences which, as I made clear in a paper that I presented last year to the Copyright Society of Australia, is a logical result in the case of end users (but not for caching intermediaries).

Anne Fitzgerald and Cristina Cifuentes discuss the special features of digital multimedia works, the various alternatives for according them protection under the *Copyright Act*, and recent court decisions that have clarified how copyright applies to such works. In particular, the authors examine in detail the *Galaxy v Sega* decisions at first instance and before the full Federal Court, before concluding that a "multimedia program which is written to create the visual effects will be protected, both in source and object code, as a literary work under Part III [of the *Copyright Act* whilst the] myriad of visual images which the multimedia software generates ... will attract copyright protection as a cinematograph film under Part IV". The authors conclude that "a broad range of multimedia works are likely to be protected under the cinematograph film heading, even in its present form". I agree with that view but would prefer to see the definition of compilation in the *Copyright Act* varied to more explicitly cover multimedia works. It would not be difficult to enact a provision that gave express protection to a compilation of works and other protected subject matter together with its cohesion elements. It would be infinitely easier to plead infringement if one could plead infringement of a single audiovisual or multimedia work instead of having to identify and plead infringement of each of the components with the danger that one or more of the cohesion elements would be incapable of being identified as 'standalone' protected subject matter.

Brian Fitzgerald looks at some of the international dimensions of copyright and substantiates the underlying logic for a universal standard of copyright protection accompanied by a national treatment principle for recognition and enforcement. He then reviews the Berne Convention and identifies as a problem its lack of an effective mechanism for ensuring member States' compliance. Following what Mr Fitzgerald describes as the "genius" of the United States in persuading members of the World Trade Organisation to incorporate the substance of Berne into GATT, he applauds the fact that the world now has a powerful weapon like trade

sanctions for breaches of TRIPS. His review of the Copyright Treaty is most useful, as is his discussion of the domestic consequences of its provisions in Australia and his conclusion with practical pointers for the information industry.

Michael Lean's paper proposes speedier rights clearances mechanisms and correctly notes that locating owners of copyright works can be a time-consuming and frustrating operation. After reviewing the practical steps that one can take to obtain copyright clearance for all kinds of protectable subject matter he wisely warns at the end of his paper that "there is no expiry date on the search for an owner. If you don't have permission, you don't have permission".

III. PATENTS AND TRADEMARKS

John Swinson's "Patents in Cyberspace: Electronic Commerce Patents" explains how electronic commerce technology can be protected by patents in Australia, USA and elsewhere. Despite the unavailability of a 'world patent', Mr Swinson notes the explosion in the number of electronic commerce patents in recent years, particularly in the United States, and includes most interesting tables demonstrating the scope of patent protection available and numerous examples of recently issued United States patents. Swinson's paper will be an inspiration to those who are devising new ways of effecting e-commerce, but perhaps a bit of a dampener on those who think that patent protection cannot cover such ubiquitous activities.

David Webber's paper focuses on intellectual property in what he calls "Internet software" which he defines to include such things as applets, those tiny program elements that can be downloaded by a browser to perform discrete tasks whilst one is running a browser. Although conventional, Mr Webber's review is useful and practical and should be a handy reference for those coming to grips with the consequences of *Going Digital*.

Phillip Hourigan's discussion about domain names and trade marks is both topical and important. He includes a particularly useful introduction to the technology of the Internet as well as a review of basic trade mark principles. For Australian readers the review of Melbourne IT's Domain Name Administration General Policy is very helpful and the comparison with overseas approaches most illuminating for those who are unfamiliar with the territory. His substantive consideration of the clash between domain names and trade marks is an important contribution to the learning in the area. Even though developments around the world are proceeding apace, the discussion of principles in Phillip Hourigan's paper is of enduring value and is to be commended. There is no doubt that the addition of new Top Level Domains will reinvigorate the debate both here and overseas.

IV. ELECTRONIC COMMERCE

Andrea Beatty's contribution entitled "Internet Banking, Digital Cash and Stored Value Cards" is a masterful introduction to Part Three of *Going Digital* dealing with Electronic Commerce. In many ways this part of the book is what I would call the pointy end of *Going Digital*. The hard commercial focus of implementing electronic mechanisms for commercial activities reflects the challenge of our times and explains the significant increase in patent application activity that is discussed in John Swinson's contribution. An introduction to the technology is essential and the author's exposition impressive. My famous claim some 14 years ago that "most lawyers wouldn't know the difference between a megabyte and a mozzie bite" is still true but, fortunately, the number like Ms Beatty in the minority is increasing rapidly!

Digital cash and stored value cards raise a number of conceptual issues under Australian law and these are discussed in a methodical and reasoned way. Distinctions between electronic payment and money, between coins and digital cash and whether banking business is being carried on are all vital issues for those wanting to embrace the wonderful benefits of electronic commerce. Abolishing the tyranny of distance and importing customers rather than exporting goods and services are two ways that I have described the benefits to Australia of the early adoption and facilitation of electronic commerce. Andrea Beatty's paper deals with all the relevant issues including privacy, data protection, codes of conduct, and jurisdictional issues as well as mainstream banking law issues. It is another very worthwhile contribution to *Going Digital*.

Brisbane lawyer Adrian McCullagh has a well earned reputation as one of the gurus of digital signatures in Australia and his paper entitled "Legal Aspects of Electronic Contracts and Digital Signatures" reflects its excellent pedigree. His analysis of the essential elements of a contract are a timely reminder of the need to return to first principles when dealing with novel facts, and his explanation of digital signatures extremely important. As he carefully notes for those who don't know any better, a "digital signature is not a computerised image of a hand written signature". Although I do not agree with his subsequent definition, involving as it does the use of public key cryptography as an essential ingredient, the debate is a necessary one and right now public key cryptography is certainly going to be the predominant mechanism employed by the next wave of electronic commerce technologies as well as secure communications more generally. The role of Certification Authorities is explained and the ramifications of paperless activities explored. Like many of the other papers in *Going Digital*, Adrian McCullagh's contribution is a most valuable one.

Steve White's paper on web site development agreements deals with what is perhaps a less prosaic area than Andrea Beatty's and Adrian McCullagh's papers but, when you realise the number of organisations entering into agreements for the development of a web site (often for no other reason than that their competitors are on the web and they feel unable to resist the urge to keep up!), it is another important contribution to the collection. Mr White's paper includes a checklist for web site customers to consider and a review of the liability issues that need to be

addressed. Certainly one cannot disagree with the author's conclusion that an appropriately drafted web site development agreement is essential.

V. LIABILITY AND PRIVACY ISSUES

Alistair Payne's "On-line Liability" is the first contribution in Part Four of *Going Digital* dealing with *Liability and Privacy Issues*. Although there is a little bit of overlap with some of the intellectual property material in Parts One and Two, there are also a number of additional elements covered including the use of metatags and unfair competition and passing off type issues.

Patrick Quirk's contribution dealing with "Defamation in Cyberspace" is obviously one that cannot be omitted and its importance in our borderless world of the Internet is self evident. Brian Fitzgerald's second contribution to *Going Digital*, covering "Internet Service Provider Liability", is one with which I have much empathy. I have spent many years lobbying for our regulators and legislators to understand the difference between the medium and the message and to understand that the postman should not be liable for what he carries. His basic conclusion that "the more an ISP knows about illegal matter or events the more liable it will become" is accurate and logical, but not yet a principle that has met with universal acceptance, particularly in the United States.

Patrick Gunning's paper on "Legal Aspects of Privacy and The Internet" completes the *Going Digital* collection and "last but not least" is an appropriate description of his contribution. The paper presents an overview of existing Australian laws touching on privacy issues that are relevant to Internet users, access providers and web site operators. It covers the often overlooked privacy obligations imposed under the *Telecommunications Act 1997* (Cth) and examines proposed codes for a self regulatory regime, such as that put forward by the Internet Industry Association. Also covered is the regulation of encryption software, presently dealt with as munitions under the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. Mr Gunning analyses the legislative background to Australia's implementation of the agreement and concludes that "those parts of the defence and strategic goods list that refer to software per se are ultra vires and of no effect".

Cookies are another feature of modern day deployment of HyperText Transfer Protocol that Mr Gunning discusses in the privacy and computer trespass contexts. He explains why, with the settings available on modern browsers, the setting and use of cookies should not be regarded as breaching the computer trespass provisions now found in most Australian states' legislation.

VI. CONCLUSION

So, in short, *Going Digital* is one of the most important collections of wisdom to be assembled in this fast growing area, and no library should fail to include it if

its readers are to have a chance of keeping abreast of legal developments that impact our lives to an increasing extent.