

New laws in the technology space

This newsletter discusses the passing of the Unsolicited Electronic Messages Act 2007 and some of the changes to copyright law proposed by the Copyright (New Technologies and Performers' Rights) Amendment Bill.

Spam legislation now passed

The Unsolicited Electronic Messages Act passed through the final legislative stages for it to become law on 5 March 2007. The Act has a 6 month lead in time, meaning it comes into force on 5 September 2007.

The Act, amongst other things, will regulate the sending of commercial electronic messages with a New Zealand link. You can check out more about the Act's purposes by looking at our earlier newsletters of June 2004, September 2005 and September 2006 (just click for a link) that tracked the progress of the Unsolicited Electronic Messages Bill.

In this newsletter, we discuss the two aspects of the Act that impact on businesses:

- the prohibition on sending of unsolicited commercial electronic messages

- the requirement for all commercial electronic messages to include accurate information about the person who authorised the sending of the message, and contain a 'functional' unsubscribe facility.

To recap, a commercial electronic message is an electronic message (eg email or text message) that:

- markets or promotes goods, services, land (or an interest in land) or a business/investment opportunity, or
- assists or enables a person to obtain dishonestly a financial advantage or gain from another person.

There are also a number of exceptions to this definition, which we will not comment on (but are discussed in our earlier newsletters).

What you need to do now

As the 6 month deadline draws closer, it is important for businesses to ensure that they are in a position to comply with the Act when it comes into force.

The first thing to do now is ensure your business has all necessary consents for sending commercial electronic messages that will be covered by the Act. To determine whether you have the necessary consent, a business will need to check the basis on which it holds its client database.

To comply with the Act, consent may be obtained in any of the following ways:

- given expressly
- inferred from the conduct and the business and other relationships of the persons concerned

- deemed to have been given where the recipient's electronic address is published conspicuously in a business or official capacity without a statement that the person does not want to receive unsolicited messages and the message sent is relevant to the business, role, functions, or duties of the person in a business or official capacity.

The second thing to do now is ensure that any commercial electronic messages which are sent by your business comply with the criteria set out in the Act. To do so, each message must:

- clearly and accurately identify the person who authorised the sending of the message (eg a sign-off with an individual's name at the end of the email)
- include accurate information about how the recipient can contact that authorised person (eg a DDI number)
- have a functional unsubscribe facility that allows the recipient to instruct the person who authorised the message that he or she does not wish to receive any further messages. The unsubscribe facility must:
 - be clear and conspicuous
 - allow the recipient to respond to the sender by the same means by which the message was first sent (eg email message and email reply)
 - be of no cost to the recipient
 - be functional for at least 30 days after the message was sent

What's inside

Spam legislation now passed

Copyright (New Technologies and Performer's Rights) Amendment Bill

To tell us what you think of this newsletter, or to have colleagues added or yourself deleted from the mailing list, contact moreinfo@minterellison.co.nz

“Consumers should be as wary about emails of unknown origin as they would be about a phone call or letter from an unknown source. Emails may appear as if they are from government agencies, banks or other well-known services. But consumers should be cautious of any offer making unusual promises or asking you for personal or financial details. If in doubt, delete.” - Deborah Battell, Australian Commerce Commission Director of Fair Trading.

- be effective within 5 days after a person has unsubscribed.

This could be as simple as writing at the bottom of your email “reply to this email with the subject “unsubscribe.””

The Act also provides for regulations to impose additional requirements in relation to when consent may or may not arise, what is not a commercial electronic message and conditions for the functional unsubscribe facility. The regulations have not yet been drafted, but are expected to be in place when the Act comes into force in September. We understand from the Ministry of Economic Development that the regulations are not intended to change the core requirements of the Act.

“Think Before You Click”

One of the problems associated with spam is a lack of understanding in dealing with it. The Australian Ministry of Consumer Affairs and Australian Commerce Commission undertook a fraud awareness campaign last month warning consumers to “think before you click.”

The Australian Ministry of Consumer Affairs suggests some tips to protect your computer from scammers. These are good tips and are of equal application in New Zealand:

- keep protection software up to date
- think before you click. Be wary of offers with unusual promises or that ask you for personal or financial details
- don’t reply to dubious emails as replying can let scammers know your account is active
- don’t click on any links or open any attachments in spam emails or pop-up boxes
- don’t access your online banking account at public sites such as internet cafes or libraries.

Spam is a worldwide problem which the new Act will not solve. But the new Act, together with these educational messages and technological measures will be an important part of dealing with it.

Copyright (New Technologies and Performer’s Rights) Amendment Bill

This Bill, which was introduced into Parliament in December 2006, amends the Copyright Act 1994 in view of the development and adoption of new technologies. The Explanatory Note to the Bill states that it seeks to clarify the application of existing rights and exceptions in the digital environment and to take account of international developments.

The Bill addresses several key technology issues but stops short of comprehensively reviewing the entire Copyright Act. Six areas that the Bill changes are discussed below:

Permitted acts

The Bill contains some new “permitted acts” or exceptions to the exclusive rights of copyright owners contained in the Act. The first is wide reaching – permitting limited decompiling, adapting and study of computer programs.

The lawful user of a copy of a computer program expressed in low level language (ie the object code version) will be able to decompile it without infringement of copyright if certain conditions are met. Those conditions are that decompilation is necessary to obtain information necessary for

the objective of creating an independent program that can be operated with the program decompiled or with another program and the information obtained from the decompilation is not used for any purpose other than that objective. The Bill provides that those conditions are not met (ie copyright is infringed by decompilation) if:

- the information necessary to create the independent program is readily available to the lawful user without decompiling the computer program
- the lawful user does not confine decompilation of the computer program strictly to the steps that are necessary to create an independent program
- the lawful user gives the information obtained from decompiling the computer program to any person when it is not necessary for creating an independent program to do so
- the lawful user uses the information obtained from decompiling the computer program to create a program that is substantially similar in its expression to the program that has been decompiled or to do any act that is restricted by copyright.

The lawful user of a computer program may copy and adapt it where necessary for their lawful use of the program (eg to correct an error) if a properly functioning and error-free copy of the program is not available within a reasonable time and at an ordinary commercial price.

Anyone may use any device or means to observe, study, or test the functioning of a computer program in order to understand the ideas and principles that underlie any element of that program. This exception is very wide reaching as it places no bounds on what the person may do with the knowledge gained from this right.

The Bill entrenches these new rights, so that they are not able to be overridden by contract and any attempted restriction is of no effect.

Secondly, the Bill introduces new exceptions for private copying of sound recordings subject to several conditions. The purpose of this is to allow purchasers of sound recordings (eg CD) to format shift the recording (eg transfer it to their PC and/or iPod). The conditions are:

- the copy is made by the owner of a legitimate copy of the sound recording, the ownership of which is retained (ie it is not hired)
- the copy is made for that person's private and domestic use
- that no more than one copy is made for each type of device for playing sound recordings that is owned by the owner of the sound recording.

The Bill provides that this new clause will expire after two years, unless renewed by the Governor-General. The new clause is also subject to the terms of the licence applying to the original sound recording, ie it can be overridden by contract.

The final provisions around permitted acts made by the Bill are to add new provisions regulating the making and use of digital copies of works by librarians.

Reproduction

Under the current Act a copyright breach can potentially occur in relation to temporary or incidental copies that might be a necessary part of a computer process, for example, when simply browsing websites. This has implications for individual computer users and organisations like Internet Service Providers (ISPs). The Bill amends the definition of

“Copyright is of central importance to the information and communication technology and creative industries, and to furthering growth and innovation in New Zealand” - Copyright (New Technologies and Performers Rights) Amendment Bill, Explanatory Note.

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“copying” to add an exception where the resulting copies have no independent economic significance.

Copying of data is a central function of the Internet and this is a commonsense exception to ensure users do not infringe copyright while surfing the net.

Internet Service Provider Liability

Copying is also central to the services provided by ISPs as they transmit data from a server to a user's computer for viewing. As a result, an ISP may face potential liability for infringement of copyright.

The Bill introduces provisions that limit ISP liability for copyright infringement. An ISP will not infringe a copyright merely because:

- a user of the ISP's services uses those services in infringing a copyright
- the ISP is storing material without modification
- infringement of copyright occurs through caching material.

The exemption for ISP liability is subject to certain conditions:

- the ISP cannot know or have reason to know that the relevant material infringes the copyright and does not block, prevent access to or delete the infringing materials
- the ISP cannot modify the material
- the ISP must adopt and reasonably implement a policy that provides for the termination of the accounts of repeat infringers. However, no more detail is provided as to when one of these account termination policies has been “reasonably implemented.”

The aim of these changes is to encourage continued cost-effective access to the Internet and to recognise the role of the ISP as merely a conduit. It should be noted that the definition of “Internet service Provider” in the Bill is sufficiently wide enough to capture providers of internet activity over mobile devices.

Communication

The Bill proposes amendments to bring the Act in line with other recent legislation, by making the terminology used in the Act technology-neutral. This will see the concepts of broadcast work and cable-programme service replaced by the concept of a communication work.

Technological Protection Measures

Technological Protection Measures (TPMs) are a form of digital lock used to prevent unauthorised access to digital material. The Bill amends the Act so that copyright owners will have the ability to take action against circumvention devices where the circumvention results in breach of a copyright.

Copyright Management Information

The Bill introduces new provisions around CMI that is part of a work. CMI is information that identifies content protected by copyright and terms and conditions of use. These provisions will prohibit:

- the intentional removal and alteration of CMI
- commercial dealing in copyright material where the dealer knows that the CMI has been removed or altered.

The Bill's Progress

The Commerce Select Committee is currently reviewing submissions on the Bill and is expected to report back on 11 June 2007. We will continue to update you on the Bill's progress through Parliament.