benchtv
a benchmark production

Précis Paper

Summary of technology, media and IP law 2018

A discussion of some of the main developments in technology, media and IP law in 2018

Discussion Includes

- Summary of technology, media and IP law in 2018
- The mandatory data breach notification scheme
- The Cambridge Analytica Scandal
- The effect of the GDPR
- The Consumer Data Right
- Consolidation in the media and tech industries
- Major defamation trials
- *Trkulja v Google*
- Changes the *Copyright Act 1968 (Cth)*
- Changes in IP law
- The ACCC inquiry into digital platforms

Précis Paper

Technology, media and IP law review of 2018

1. In this edition of BenchTV, Eli Fisher (Senior Associate, HWL Ebsworth) and Julia Park (Lawyer, AR Conolly and Company) discuss some of the main developments in 2018 in the areas of technology, media and IP law.

Summary of technology, media and IP law in 2018

2. More than anything, 2018 has really been the year of data protection. It began with the implementation of the mandatory data breaches notification scheme, which came into effect in February. While that was all unfolding, the biggest data scandal of the year, involving Facebook and Cambridge Analytica, was breaking. At the same time, businesses in Australia were preparing for the GDPR - a European law, but one that affects the way things are done in Australia. On top of that, there is now a consumer data right and a data commissioner, and there have been some highly-politicised changes to encryption law and the law around health files.
3. There have also been some big stories in media law, with some major changes to media ownership. This has led to structural changes within the industry, perhaps most notably the merger between Fairfax and Nine.
4. There have also been some really high profile defamation cases, and some huge damages awards. This started off with actress Rebel Wilson's case, but there have also been large awards involved in the Wagner family's case against radio shock jock Alan Jones and the radio stations 2GB and 4BC.
5. A trio of male celebrities sued for defamation in connection with claims that they had acted in sexually improper ways: Chris Gayle, Craig McLachlan and Geoffrey Rush.
6. There was also the first High Court judgment involving defamation by a search engine.
7. In copyright and other areas of intellectual property, safe harbour was extended to educational and cultural institutions and organisations assisting people with disabilities, notably leaving off internet intermediaries.
8. What did get extended to internet intermediaries, though, was the ambit of the siteblocking provision at s115A of the *Copyright Act 1968 (Cth)*.
9. This year, the ACCC has released its preliminary report into digital platforms, most notably Facebook and Google.

The mandatory data breach notification scheme

10. From the 22nd of February of this year, changes to the *Privacy Act 1988 (Cth)* came into effect, which obligated APP Entities to notify individuals whose personal information is involved in a data breach if the breach is likely to result in serious harm.

11. A data breach is an unauthorised access or disclosure of personal information, or loss of personal information. It could include a sophisticated hack, but it could also include losing a phone or other device in some circumstances.
12. Previously, people could make voluntary notifications, but it was never mandatory. If an eligible data breach takes place, the relevant APP Entity would need to notify affected individuals and the Australian Information Commissioner.
13. Tech lawyers had to help clients be prepared for the new scheme. Because there is a timeframe by which notification must take place, a lot of businesses prepared data breach response plans. These are essentially internal documents that help an APP Entity know what to do in the event of a data breach. It would tell them how to meet their obligations, how to limit the consequences of a data breach, who in the organisation is responsible for managing and assessing data breaches, how things are documented and so on.
14. In the lead-up to the scheme being implemented, APP Entities were addressing data breach notifications in their commercial contracts - which party was responsible for notifying, and how it must be done. At law, each party involved in the breach is responsible for notifying, but also discharges that obligation if the other notifies. It became quite important to negotiate prior to entering into the agreement what happens in the event of a breach.
15. Following the scheme coming into effect, most of the work for tech lawyers has been advising on suspected data breaches and helping clients notify if need be. Through the entire process, there have been training exercises with clients.

<u>The Cambridge Analytica Scandal</u>

16. Cambridge Analytica is an interesting case study on a number of levels: commercially, legally, politically, socially. It began with a seemingly innocent personality quiz doing the rounds on Facebook in 2014. The app was developed by a company called Global Science Research (GSR), and was downloaded by around 270,000 users, and each one was paid between one and two dollars to take a personality test. Supposedly GSR was to use the information for academic purposes. GSR also collected information about each user's Facebook friends, so while each user may have consented to giving the information to GSR, the friends would not have.
17. GSR collected the data through a Facebook tool. It then gave the data to Cambridge Analytica. In 2015, Facebook discovered how much data had been collected through the app, and removed it from the platform demanding that the data be destroyed. Cambridge Analytica certified that it had destroyed the data, and that was the end of that, until March this year, when Facebook announced that it was suspending Cambridge Analytica from Facebook, for failing to delete all the data. It turned out that Cambridge Analytica may have used the data to assist Donald Trump's election campaign.
18. Many users began to publicly '#DeleteFacebook' in a protest cultivated on Twitter. Facebook shares lost US$80B in the wake of the scandal. There were class action lawsuits, advertisers

threatened to revolt, and Mark Zuckerberg was summoned to testify before Congress. Regulators scrambled to investigate, including Australia's Privacy Commissioner following confirmation that the information of more than 300,000 Australian users may have been implicated. The ACCC shifted the focus of its digital platforms inquiry to privacy protection and the fairness of Facebook's terms and conditions.

19. Eli Fisher believes that the moral of the story is a cavalier attitude to privacy isn't working for anyone anymore. A data strategy of "let's collect and retain as much as we can and work out what to do with it all later" is turning into a liability, and is a mentality that doesn't really work for anyone, including advertisers, regulators, companies, customers, shareholders.
20. Culturally, it may be that 2018 was the year that the shine started to wear off of the Big Tech companies. There had always been discrete legal skirmishes, for copyright rights-holders, competition and consumer regulators, privacy warriors, tax offices and so on, but the tech innovators had always remained the darlings of the political establishment, protected somewhat by legislators and regulators. There seems to have been a shift culturally away from tech companies, and that has translated into a political shift as well.

<u>The effect of the GDPR</u>

21. The *General Data Protection Regulation (EU) 2016/679* (GDPR) is an EU data protection law, the most comprehensive and ambitious law of its kind. It came into force on 25 May of this year in all member states of the EU, and it brought along a new regime of data protection and large penalties that replaced all existing privacy law in Europe. These laws have extraterritorial scope, which is to say that they have an impact on how people and businesses in Australia operate. Where an Australian business has an establishment in the EU, offers goods and services to individuals in the EU, or monitors the behaviour of individuals in the EU, the GDPR applies to the way they process personal data.
22. There are a number of key differences between Australia's regime under the *Privacy Act* and the GDPR. Firstly, the GDPR contains a suite of individual rights which are mostly quite foreign to Australians. Australians have the right to access personal data held about them, and to correct that data. But there are a few rights in the GDPR, like the right to be forgotten and rights related to automated decision making, which are new to Australians. There is a data portability right that was also new to Australians, although Australia's move recently to implement a Consumer Data Right is bringing our regime more in line with the Europeans', even if only incrementally at this stage.
23. The GDPR also creates a need for a local European representative, a need to maintain a register of processing activities, a need to appoint a Data Protection Officer, and a need to be specific about the lawful basis on which an entity is processing data.
24. Interestingly, our data breach notification scheme was largely based on the GDPR's scheme, so had we not implemented our scheme in February, the GDPR obligations could have been applicable in any event to entities caught by the GDPR.

25. One of the most noteworthy aspects of the GDPR is its penalties. Under the GDPR, there are increased administrative fines for non-compliance: serious contraventions can result in penalties of up to €20 million or 4% of annual worldwide turnover (whichever is higher), and less serious contraventions can result in penalties of up to €10 million or 2% of annual worldwide turnover (whichever is higher). Privacy complaints in Australia are resolved with relatively little financial cost to the infringer by way of compensation or penalty, so this is quite game-changing in terms of setting the bar for privacy protection. These are interesting measures aimed at bringing transparency and accountability to data protection.
26. Lawyers are involved in the usual advisory and training, but actually a lot of their work involves drafting and reviewing data transfer agreements. Under the GDPR, when a controller seeks to engage a processor to process data, the controller must use only processors providing "sufficient guarantees" to implement appropriate technical and organisational measures to ensure that processing will meet the requirements of the GDPR, and ensure the protection of the rights of the data subject. These guarantees are generally given between the two parties in a data transfer agreement. When data is transferred from the EU to Australia, there are standard contractual clauses that need to be agreed as well.

The Consumer Data Right

27. The Consumer Data Right is intended to give Australians stronger controls over their data, allowing customers to share their data with recipients only for the purposes that they have authorised. At first, the right will be implemented in the banking, energy and telco sectors, and then it will be rolled out across the economy on a sector-by-sector basis. So a bank customer should be able to access the data that the bank holds on her or him, such as spending information, deposit and credit account transactions, and basic product information, and then safely transfer that data to trusted parties.
28. The ACCC will head up regulation of this new right, but will be assisted by the OAIC which houses the Privacy Commissioner, as well as the Data Standards Body. And this is all coming about at the same time as the establishment of a National Data Commissioner. The National Data Commissioner will work with the OAIC to oversee Australia's data sharing and release framework.
29. Data has somewhat belatedly risen to the forefront of tech law, as society comes to appreciate more profoundly the opportunities, but also the risks, that have accompanied the massive leaps in data science and digital technology.

Consolidation in the media and tech industries

30. Toward the end of last year, Australia simplified its media cross-ownership rules by repealing the '2 out of 3' rule and the '75% reach' rule. This has paved the way to some consolidation in the media industry, most notably the merger of Nine and Fairfax. Separately, Fox Sports and

Foxtel merged in the middle of this year after the ACCC dropped its initial opposition to the deal. TPG and Vodafone Hutchison Australia are looking to merge, although there appears to be a possibility that the ACCC will block that merger.

Major defamation trials

31. In the middle of 2017, actress Rebel Wilson succeeded in her defamation claim against Bauer Media, to the tune of $4.7m. This was the largest ever award in Australian defamation history. This year, however, the Court of Appeals reduced that amount to $600,000. Rebel Wilson tried to appeal to High Court but was refused special leave, so the decision of the Court of Appeals stands.
32. The Wagner family was awarded $3.7m in their defamation claim against radio shock jock Alan Jones and the licensees of 2GB and 4BC
33. Cricketer Chris Gayle won $300,000 against Fairfax Media for reports that claimed he exposed himself to a female massage therapist in Sydney
34. Actor Geoffrey Rush sued the publisher of The Daily Telegraph over reports that the he had behaved inappropriately toward a young actress during the Sydney Theatre Company's production of King Lear. The case has been heard, but we don't have a judgment yet.
35. Actor Craig McLachlan is suing Fairfax and the ABC over reports that he indecently assaulted and bullied female cast members during the stage production of Rocky Horror Show.

Trkulja v Google

36. In the Google case brought by Milorad Trkulja, the plaintiff brought a claim against Google for defamation, and in 2012 won. He was awarded $200,000. The claim was brought because when Google users searched his name, search results would appear that linked him to underworld figures. In particular, Google Images results when searching his name would contain photos of well-known underworld figures in Australia.
37. Generally, defamation litigation involving search engines goes to whether the search engine is a 'publisher' under defamation law. This raises really tricky but interesting issues.
38. Google appealed to the Court of Appeal, and won. The basis of their win was actually not in relation to whether Google was a publisher, but whether the search results were capable of being defamatory.
39. The Court of Appeal found that the matter complained of didn't have defamatory capacity. This question is usually considered by reference to the ordinary, reasonable person. Here, the Court of Appeal was interested in the ordinary reasonable search engine user. This person would understand that searches are conducted at great speed, would appreciate the enormous scale of such searches, and would understand that such searches could not possibly have been performed manually. An ordinary reasonable search engine user would know that the search results did not necessarily reflect the meaning of the searched words.

40. Now, if search engine results aren't capable of being defamatory, then that would make it very difficult if not impossible to ever sue a search engine for defamation.
41. So the case came before the High Court. And ultimately the High Court unanimously ruled in favour of the plaintiff, holding that search results can have capacity to defame, and that search engines could be publishers under defamation law. It doesn't quite settle the dispute, but it was the first time that the High Court considered the law of defamation in the context of search engines. And the judgment means that search engines might be liable for defamation in respect of search results.

Changes to the *Copyright Act 1968 (Cth)*

42. Google and other online service providers have long wanted the *Copyright Act*'s safe harbour provisions to be extended to them as well. They got pretty close when at the end of 2015, an exposure draft of a Bill was released to that effect. But this year, the Act was amended to extend safe harbour to cultural and educational institutions as well as organisations assisting people with a disability. Conspicuously, safe harbour was not extended to online service providers. Then on 28 November 2018, Parliament passed a Bill extending the siteblocking provision at s115A to search engine providers. So previously rights-holders could ask a court to enjoin an ISP to take steps to disable access to an online location outside Australia that has the primary purpose of facilitating copyright infringement. Now rights-holders can ask the Court to make such orders in respect of search engines as well.

Changes in IP law

43. In 2018 the Government introduced two separate Bills amending Australia's IP laws in light of recommendations made by the Productivity Commission. The first one has passed, so among other things, it's now easier for parallel importers to rely on the parallel importation defence, and it's riskier for complainants to make unjustified threats.
44. The second Bill has been exposed for consultation, but not yet introduced. That Bill is likely to make significant changes to patent law, including amending inventive step requirements for Australian patents, and phasing out the innovation patent system.

The ACCC inquiry into digital platforms

45. The ACCC is conducting a world-first inquiry into the impact of online search engines, social media and digital content aggregators on competition in the media and advertising services markets. The ACCC was asked at the end of last year to look at how this impacts media content creators, advertisers and consumers, as well as the impact on news and journalistic content. So this inquiry implicates basically every major player in the tech and media space. This year,

submissions have been published online from many of those companies, which have been of enormous interest.

46. Earlier this month, the ACCC released its preliminary report for discussion. The report identifies concerns with the ability and incentive of key digital platforms to favour their own business interests, through their market power and presence across multiple markets. This has been an issue for European antitrust regulators as well in 2018.
47. The report also looks at the digital platforms' impact on the ability of content creators to monetise their content. Again, this is something that the Europeans have tried to address with changes to copyright law in Europe. Further, the report addresses the lack of transparency in digital platforms' operations for advertisers, media businesses and consumers. Consumers' appreciation of the copious amounts of information about them collected by digital platforms, and their concerns regarding the privacy of their data, are also critical issues for this inquiry, as is the role of digital platforms in determining what news and information is accessed by Australians, how this information is provided, and its range and reliability. Echoes of the Cambridge Analytica scandal reverberate through the report.
48. The preliminary report makes a nice denouement for 2018. The ACCC looked generally at digital platforms, but noted that the influence, significance and size of Google and Facebook in particular has resulted in them being the principal focus of the inquiry. So a year that began with data breaches and Cambridge Analytica, that featured a High Court defamation case against Google, copyright law reform in Australia and the EU that provides some protection for content creators against digital platforms, and major overhauls of data protection law, ends with a genuinely game-changing report by the ACCC about digital platforms. Although it is just a preliminary report, it sets 2019 up to be a really fascinating year for tech lawyers in Australia.

BIOGRAPHY

Eli Fisher

Senior Associate, HWL Ebsworth, Sydney

Eli is a commercial lawyer and adviser at HWL Ebsworth, with expertise across technology, intellectual property, privacy, competition and consumer, and media laws. His experience spans a range of industries, including technology and online businesses, the media, entertainment and content industries, aviation, advertising and fashion.
Eli edits the Communications Law Bulletin, and sits on the Boards of the Copyright Society of Australia and the Communications and Media Law Association. In 2018, Eli completed a Master of Laws degree at UNSW, where he was named the best performing post-graduate student across the law faculty. He completed two specialisations (in Media & Technology Law, and Innovation Law) and graduated 'With Excellence'.

Julia Park

Lawyer, AR Conolly and Company, Sydney

Julia graduated from the University of Sydney with a double degree in Law and Commerce. Julia's career in law started in 2009 at A R Conolly & Company followed by various litigation work in commercial and corporate. Julia tutored Business Law at the University of Sydney.

BIBLIOGRAPHY

Cases

Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154
Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201
Gayle v Fairfax Media Publications Pty Ltd (No 2); Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2) [2018] NSWSC 1838
McLachlan v Browne & Fairfax Media Publications Pty Ltd; McLachlan v Browne & Australian Broadcasting Corporation [2018] NSWSC 341
Rush v Nationwide News Pty Ltd [2018] FCA 357
Trkulja v Google Inc [2018] HCA 25

Legislation

Copyright Act 1968 (Cth)

Privacy Act 1988 (Cth)

Privacy Amendment (Notifiable Data Breaches) Act 2017 (Cth)

General Data Protection Regulation (EU) 2016/679