In recent years, point-of-sale activated or “POSA” cards have become the norm in traditional retail outlets. POSA cards take many forms. Common examples are “pressie” or gift cards that are pre-loaded with specified monetary credits to be used in designated retail outlets, pre-paid phone cards and pre-paid commuter cards for travel on public transport. POSA cards are favoured by retail outlets in the name of minimum space and maximum product range.

In days gone by, to purchase a product such as a software application, the purchaser would buy it from a physical store retailing such products. The software application would be supplied on a CD, which would be packaged in a box wrapped in clear plastic film. The terms of the licence for the use of the software would be printed somewhere on that box. That form of purchasing changed with online internet shopping, where the purchaser goes to a software reseller’s website, selects and pays for the software application. The purchaser is then given an alpha-numeric code to download the software from the software supplier’s website.

POSA cards provide an attractive alternative to online shopping. POSA cards for a variety of software products are displayed on a rack in a physical store. The purchaser selects the card for the product that he or she wishes to purchase, takes the card to the checkout counter in the store and pays for the product. The checkout operator scans the bar code on the POSA card, puts the transaction through the till and gives the purchaser a sales receipt and an alpha-numeric code to access and download the product online from the software supplier’s website.

The use of POSA cards has expanded phenomenally as a packaging concept which allows virtual products, such as computer games and other software products, to be packaged as nothing more than a card and made available for purchase by customers in retail outlets. Each POSA card has an activation code which can only be used after the code is activated at the checkout. The attraction for the supplier is that there are significant savings on the packaging and transportation of the actual product. For the retailer, it means minimum display space and the ability to display a greater range of products in the store.

The advent of “click-wrap” or “click and accept” licence agreements

POSA cards will usually contain a statement or notice that the sale or use of the product is subject to the supplier’s standard terms of trade or standard terms of use located at the supplier’s website. It is also not unusual for those standard terms of trade or standard terms of use to contain a myriad of clauses excluding the supplier’s liability for any loss or damage arising from the use the product. When the purchaser accesses the supplier’s website to download the software using the code given, the supplier’s terms of use will appear on mandatory initial screens following the “splash” or first screen. The purchaser has to confirm acceptance of the supplier’s terms of use by clicking on the “I accept” or “I agree” box on the screen before download begins. As a purchaser can avoid such mandatory screens by pressing the return or enter key without reading the terms of use, it is not uncommon to see a further requirement for the purchaser to confirm that he has read and accepted the terms of use before being permitted
to move to the main menu or the next screen. It is trite law that if the supplier wishes to rely on an exclusion clause it must be incorporated in the contract of sale. In the absence of a signed contract (L’Estrange v Graucob [1934] 2 KB 394), or a regular and consistent course of dealings between the parties (McCathcheon v David MacBrayne Ltd [1964] 1 WLR 125), the supplier must have given reasonable notice to bring the exclusion clause to the purchaser’s attention prior to the conclusion of the purchase (Parker v SE Railway (1877) 4 CPD 416). Where the sale of a product involves a POSA card, is the notice or statement on the POSA card sufficient to satisfy the reasonable notice rule prior to the conclusion of the purchase?

The case of Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686 springs to mind. In that case, the plaintiff parked his car in the defendant’s car park. There was a notice outside the park displaying the parking rates, along with the statement “All cars parked at owners’ risk”. When the plaintiff drove into the car park, a machine issued a parking ticket which had the time printed on it, together with the statement “All cars parked at owners’ risk”. When the plaintiff drove into the car park, a machine issued a parking ticket which had the time printed on it, together with the statement that the ticket was issued subject to conditions displayed on the premises. To find those conditions, the plaintiff would have to walk round the park to locate the panel on which those conditions were displayed. One of the conditions purported to exempt the plaintiff from liability for damage to the cars parked in the premises and for personal injury suffered by the customer. The plaintiff never thought to look at the conditions. Upon returning to collect his car, the plaintiff sustained personal injury. In its defence to the plaintiff’s claim, the defendant stove that the plaintiff had not been provided with sufficient notice of the exclusion clause that such terms were displayed. One of the conditions purported to exempt the plaintiff from liability for damage to the cars parked in the premises and for personal injury suffered by the customer. The plaintiff never thought to look at the conditions. Upon returning to collect his car, the plaintiff sustained personal injury. In its defence to the plaintiff’s claim, the defendant stove that the plaintiff had not been provided with sufficient notice of the exclusion clause. The Court held that both parties had analysed the contract incorrectly. The Court found that it was not simply a sale of goods contract, but the right to use the intellectual property of Informix that was embodied in the product. The use of the software product was subject to consent being given by Informix. Such consent took the form of the licence conferred on the purchase of the software. For the transaction to be effective, Adobe was given both the medium and the right of access and use.

Conclusion

Traditional principles applicable to sale of goods do not sit comfortably with POSA card transactions, especially where the product involved is a software application. Courts will be more likely to endorse click-wrap licence agreements if the terms are fair and reasonable to the purchaser. Proper and reasonable notice of those terms must be given.

Suppliers who use POSA cards to sell their products will have to ensure that their click-wrap contract terms are not unusual, unexpected, or exceptionally onerous. Under the Disputes Tribunal Act 1988, a tribunal is required to determine a dispute according to the substantial merits and justice of the case and may disregard any provision in a contract that excludes or limits conditions, warranties or undertakings. Further, under the “unfair contract term” provisions of the Fair Trading Act 1986, the District Court or the High Court may, on the application of the Commerce Commission, declare that a term in a standard form consumer contract is unfair.  

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+ Consumer law, contract law

“POSA” CARDS AND “CLICK-WRAP” CONTRACTS

Continued from page 1

[1930] 1 KB 41, where the plaintiff purchased a train ticket which stated on its reverse side that it was issued subject to the conditions set out in the defendant’s timetable. The timetable had to be purchased separately. The court held that the plaintiff was bound by the exclusion clause relied on by the defendant, as the defendant had given reasonable notice of the clause, notwithstanding the fact that the relevant clause was to be found on page 522 of the timetable.

Does that therefore mean that the Thompson case applies if the POSA card states in very clear words that the sale or use of the product is subject to the supplier’s terms and conditions of trade, even though those terms of trade can only be viewed by visiting the supplier’s website? Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433 says that, if the exclusion clause relied on is unusual, unexpected, or exceptionally onerous then, more is required. In Spurling v Bradshaw [1956] 2 All ER 121, Lord Denning said that such provisions “would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”.

The shrink-wrap cases

Judicial writing on the validity and enforceability of click-wrap licence agreements in the context of POSA card transactions is lacking. Guidance will therefore have to be drawn from the so-called “shrink-wrap” licence agreement cases. Typically, a shrink-wrap licence agreement will be printed on the outside of the box or packaging for the software product. The licence agreement can be read through the clear plastic wrapper of the box or packaging, and will say that opening the package or using the software constitutes acceptance of the supplier’s terms of use.

In ProCD Inc v Zeidenberg 86 F.3d 1447 (7th Cir. 1996), the US Circuit Court held that the purchaser of software was bound by the terms of the licence when the purchaser started using the software, even though he had no opportunity to look at those terms when he ordered and paid for the software. The Court opined that the contract was formed not at the time of purchase, but after the purchaser had had the opportunity to examine the product and the terms. In Hill v Gateway 2000 Inc., 105 F.3d 1147 (7th Cir. 1997), the Court held that the buyer was bound by the standard terms of trade even though he did not read them. The Court held that by using the software, the buyer accepted the terms of trade.

The UK decision of Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd [1996] SLT 604 has shed further light as to the true nature of shrink-wrap contracts. In that case, Adobe placed a telephone order with Beta Computers for the supply of Informix software. The terms and conditions of sale were not discussed. When the software was delivered, it was packaged in such a way as to show that the software was subject to a strict end-user licence and that the package contained “End-User Licence Conditions” under the name of Informix. The packaging was shrink-wrapped. Visible beneath the wrapping were the words “Opening the Informix Software package indicates your acceptance of these terms and conditions”. Adobe never opened the packaging and decided to return the software after delivery without payment. Beta refused to take back the software and sued for the price. The parties argued the case on the basis that it was a contract for the sale of goods.

The Court held that both parties had analysed the transaction incorrectly. The Court found that it was not simply a sale of goods contract, but the right to use the intellectual property of Informix that was embodied in the product. The use of the software product was subject to consent being given by Informix. Such consent took the form of the licence conferred on the acquisition of the software. For the transaction to be effective, Adobe was given both the medium and the right of access and use.

The shrink-wrap cases
Introducing the ADLSI Technology & Law Committee

Innovation lies at the heart of our changing world. From government policy to the practice of law, technology creates amazing opportunities and daunting challenges. The ADLSI Technology & Law Committee (Committee) sees itself as having a mandate to keep up-to-date with the times and offer relevant perspectives on topics such as modernising legal processes, electronic discovery rules, privacy, intellectual property, online safety, cyber-crime and cloud services governance.

The Committee has a keen interest in the development of law and policy with a technological aspect. Members maintain a watching brief and make submissions on new pieces of legislation and government policy in relation to the use and security of technology and data security. In recent times, submissions have been made on the Harmful Communications Bill 2013, the Patents Bill, and the review of the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

Recognising that technology has the potential to impact a whole raft of different legal practice areas, the Committee members bring together a wide range of backgrounds. Current Committee members are:

**Melanie Johnson** – Committee Convenor
Melanie Johnson is legal counsel at the University of Auckland, working in Libraries and Learning Services. She advises the University on a broad range of issues, including copyright, privacy and contracts. She has a particular interest in copyright and the impact of technology on the way in which copyright material is being generated and used. She can be contacted at mf.johnson@auckland.ac.nz.

**His Honour Judge David Harvey** – Judge Harvey was appointed as a District Court Judge in 1989 and sat at Manukau for 20 years before transferring to Auckland in 2009. Since his appointment to the bench, Judge Harvey has been closely involved with information technology initiatives involving the judiciary, including the development of trial management software.

**Mark Donovan** – Mark Donovan is a barrister specialising in employment-related matters and disputes, as well as acting in relation to other civil disputes (including liquidations, restraints of trade, confidential information and regulatory investigations). Mr Donovan is also the co-founder of Quillo, an online service to help lawyers serve their clients using automated document assembly. He can be contacted at mark@markdonovan.co.nz.

**Andrew Easterbrook** – Andrew Easterbrook is a senior lawyer at Webb Ross McNab Kilpatrick in Whangarei. He works in the dispute resolution team, dealing mainly with technology law, civil litigation and contentious relationship property disputes. He is also a musician and computer geek. He can be contacted at andrew@wrmk.co.nz.

**Kevin Glover** – Kevin Glover is a barrister at Shortland Chambers, practising in the area of commercial disputes. He has particular expertise in intellectual property including acting as counsel, teaching at postgraduate level and writing for a number of publications. He writes about intellectual property law and other legal issues on his website, www.iplawyer.co.nz, and can be contacted at kglover@shortlandchambers.co.nz.

**Arran Hunt** – Arran Hunt is a solicitor at MacDonald Lewis Law, a boutique commercial law firm with a specialty in franchise and commercial IT law. Mr Hunt was previously working as a technical business analyst, for a Fortune50 company in London and several large firms and city councils in Auckland, before being admitted in 2010. He has an interest in the interrelation of technology with law and business. He can be contacted at arran@mlaw.co.nz.

**Anthony Liew** – Anthony Liew is the resident lawyer at Zeald website development and design. He has practised as a civil litigator in New Zealand and overseas since 1974, following admission as a Barrister of Lincoln’s Inn, London. Throughout his career, Mr Liew’s main focus has been commercial law, including corporate insolvency and corporate litigation, privacy and terms of trade, and intellectual property protection and commercialisation. He can be contacted at Anthony.Liew@zeald.com.

**Edwin Lim** – Edwin Lim is a partner at Hudson Gavin Martin, a commercial and corporate law firm specialising in technology and IP. Edwin has significant experience in New Zealand and the Middle East in technology procurement, outsourcing, IP commercialisation, technology due diligence, and general commercial matters. Mr Lim has a passion for technology – in addition to his law degree, he has a commerce degree majoring in Information Systems, so he understands both the technical, commercial and legal issues involved in technology matters. He can be contacted at edwin.lim@hglmlegal.com.

**Nigel Mason** – Nigel Mason practises at Regent Law, which has offices in Whangarei and Auckland. He has over 40 years’ experience as a solicitor and has practised in England and Papua New Guinea, as well as New Zealand. While practising in England, he spent 11 years specialising in IP and IT related matters, returning to New Zealand in 2000. Mr Mason handles both residential and commercial property sales and purchases, commercial and company transactions, trusts, wills and estates as well as immigration. He can be contacted at nigel@regentlaw.co.nz.

**Nathan Speir** – Nathan Speir is a senior solicitor at Rice + Co Lawyers in Auckland. Mr Speir is an experienced courtroom advocate with extensive trial, arbitration and mediation experience. Before joining Rice + Co, Mr Speir commenced his career at the Office of the Crown Solicitor for Auckland. He now specialises in local government and insurance litigation and is currently completing an LLM at the University of Auckland. Mr Speir can be contacted at nathan@riceandco.co.nz.

**Sophie Thoreau** – Sophie Thoreau is a senior associate with Baldwins Law Limited. Ms Thoreau specialises in the application of intellectual property in commerce, particularly in contentious trade mark and branding-related matters in New Zealand and internationally. She has been involved in a number of complex cases, developing new and emerging concepts of case law for regional and multinational clients. She can be contacted at sophie.thoreau@baldwins.com.

**Mark Utting** – Mark Utting is a partner at Thode Utting & Co. Mr Utting specialises in criminal, relationship property, immigration and civil law. In addition to his legal background, he holds a Masters of Arts (majoring in Russian) and also completed a Diploma in Forensic Science at the University of Auckland. He can be contacted at mark@thodeuting.com.

The Committee welcomes comments or questions – please direct to helen.young@adls.org.nz.
Switching on to new technology in the courtroom and beyond

By Judge David Harvey

His Honour Judge Harvey provides a round-up of new technologies and ideas for the future practice of law following on from his attendance at the biannual Court Technology Conference in Baltimore.

Every two years the National Center for State Courts runs a Court Technology Conference (CTC). These are enormous gatherings, bringing together people involved in all aspects of justice delivery both from the US and internationally.

In September 2013, I was fortunate to attend the CTC Conference, which was held in Baltimore over three days. Each day comprised several interesting sessions, each of which presented its own invigorating and exciting food for thought.

There are a number of streams or tracks at CTC Conferences – in 2013, there were seven. The streams involved self-represented litigants, judicial use of technology, management of Court IT, use of remote video technology, futures for case management and data management, and, finally, “Courtroom 21” presented by the Center for Legal and Court Technology.

Oops – can I recall that tweet?

The day got started with a brilliant keynote by Alec Ross, who formerly worked with Hillary Clinton when she was Secretary of State. Some interesting observations came out of this session.

One example involved the use of social media whilst State Department representatives were on a mission in Syria. One member of the delegation sent a flippant tweet involving a frappuccino – nothing remarkable but the news media picked up on it and there was considerable criticism which lasted for a news cycle and resulted in embarrassment for the delegation.

The upshot? Mr Ross used this as an example of treating mistakes as misdemeanours rather than felonies. Was this a career-ending “offence”? Of course not. In fact, Mr Ross said that Mrs Clinton’s response was that “if you don’t take fire you are bombing the wrong target”. Worth thinking about when mistakes are made and there is a possibility for overreaction. I guess in these days of social media we may all have our “frappuccino” moments.

Technology – it can be both friend and foe

My primary (although not exclusive) interest was in the judicial stream. In the first session I attended, Judge Martin Gonzales from Colorado and Judge Dory Reiling from the Netherlands talked about “technology turn-offs”. Rather than this being a “hate session” about technology and the courts, it was more of a cautionary discussion.

A mock trial [involved] the presentation of evidence using 3D technology. The evidence could be manipulated and rotated so that it could be viewed from all angles and yes, 3D glasses were necessary.

Judge Gonzales emphasised the importance of ensuring that litigants did not become “aspects of data”. The Court process is a human process, where judges must engage personally with litigants, and Judge Gonzales gave some salutary examples. So yes, technology can be a tool, but it should not take over.

Judge Reiling described ways in which technology can be applied in the litigation process as a facilitative tool towards achieving an outcome, be it by way of settlement or judicial decision. Using a matrix, she was able to demonstrate where technological interventions may take place.

One interesting development that she noted was a system used by the English Courts, where individuals may file claims for debt online – essentially a tool for self-represented litigants.

Can technology assist self-represented litigants?

That segued nicely into the next session I attended which was about the ways in which technology may assist self-represented litigants (SRL) to file and progress their claims. The presenters identified SRL needs and then suggested ways in which technology may meet these needs.

The basic model is for Courts to have an access portal for SRLs, remembering that access must be effective in that those with disabilities need to be catered for; that legal language should be avoided, that procedures need to be simply explained, and that there should be effective help facilities provided (including online advice). Given the increase in SRLs, especially with the cuts that have been made to legal aid, there must be ways in which SRLs can have meaningful access to the Court system.

Evidence and discovery – can software come to the rescue?

During Day 2 of CTC 2013, I spent a fascinating morning checking out some of the software solutions demonstrated by vendors in the very large and impressive exhibitors’ hall. Most of the solutions dealt with evidence recording and presentation, Audio Visual Links (AVL) systems and case management systems.

What I would consider to be trial management solutions for judges seemed to be absent, which was something of a surprise. Neither was there anything on show about e-Discovery, although to be fair, that is of more interest to lawyers than court administrators and judges.

However, later that day I co-presented a paper which considered aspects of e-Discovery from a judicial perspective. My co-presenter was Daniel Garrie, a Senior Managing Partner at Law & Forensics, an e-Discovery, cyber security, and electronic forensic consulting firm with offices nationwide. Mr Garrie is also General Counsel of Pulse Advisory, a venture development firm. Mr Garrie was able to bring some technological and practical insights to the discussion of the e-Discovery process.

Courtrooms enter the third dimension

One session of the Conference that was very interesting was a mock trial, “Courtroom 21”, presented by Professor Fred Lederer and his team from the Center for Legal and Court Technology at William and Mary Law School in Williamsburg, Virginia. The focus of the trial was the presentation of evidence (in this case a brick used in an assault), using 3D technology.

The reason for the use of this technology – and it would not be justified in every case – was to preserve the evidential integrity of the exhibit. Attached to the brick were hair and skin samples, blood and, of course, DNA. Handing the exhibit around the jury would involve DNA contamination and possible disturbance of the hair and skin fragments.

It was an interesting demonstration that generated an animated discussion. The 3D camera was very large and ungainly but in the future I imagine it will scale down. The evidence could be manipulated and rotated so that it could be viewed from all angles and yes, 3D glasses were necessary.

Back to the future

On Day 3, I was involved in another session, co-presenting with Judge Robert Torres from Guam, Judge Dory Reiling and Judge Martin Gonzales (mentioned above). The session attempted some “crystal ball gazing”, and tried to divine how court and judicial technology needs might evolve over the next 10 years. What adjudicatory processes on the bench or in chambers could be made easier with technology? What external drivers, like the increase of SRLs, will need to be addressed? It was a lively and thought-provoking discussion.


**Data centre terms and conditions**

A guide for practices considering using data centres

By Andrew Easterbrook, Senior Lawyer, Webb Ross McNab Kilpatrick

"Cloud computing" is a bit of a buzzword and I am not sure if it will still be used in a few years. But one way lawyers might like to make use of technology is to replace in-house servers with data centres. Below I set out the circumstances in which I think you should or could do so, and some contractual issues to consider.

Although it is technically using the "cloud", practically speaking, moving your servers to a data centre is just a shift of the physical server hardware from your office to some other building somewhere else, on hardware owned by someone else. There is a longer cable and maybe a few extra boxes in between.

Current pricing is about on par with buying new servers every five to seven years or so, depending on provider and the level of service you need. Within the next five to 10 years, infrastructure and bandwidth upgrades, together with inevitable cost reductions, will probably make a decision to buy new servers (when your existing ones die) a bad idea from a financial perspective.

So, starting now, and provided that a number of conditions are met, I suggest all law firms should move to data centre storage instead of replacing existing dead or dying servers. However, these are the conditions you need to think about first:

**Type of contract:** The provider gives you a contract specifically tailored to law firms, or you have bargaining power and can negotiate your own contract. The reason is that most boilerplate data centre contracts do not allow you to meet your ethical obligations. I have set out some initial things to consider below. As part of this, you will also need a service level agreement (SLA) – consider what sort of guarantees about uptime and support you need, and what sort of compensation you should get if the service is inadequate.

**Type of connection:** The (fibre) connection between your office and the data centre is managed by your ISP. This is a "lit" connection. You have exclusive use of a fibre optic cable, are responsible for the end to end equipment, and the connection is physically isolated from any other user of the data centre and fibre network; or

- **Layer 1 or dark fibre** – a dedicated physical connection between your office and the data centre. This is an "unlit" connection. You have exclusive use of a fibre optic cable, are responsible for the end to end equipment, and the connection is physically isolated from any other user of the data centre and fibre network; or

- **Layer 2** – a connection where you do not have to manage the routing equipment at each end and instead that side of things is managed by your ISP. This is a "lit" connection. Your data will be transmitted via your fibre provider's network rather than directly between you and the data centre. However, it will not be transmitted via the wider internet.

The only other option is "Layer 3", which is really just a normal internet connection. For a number of reasons, no law firm should be transmitting all of their information (including documents, data, files, records, logs of transactions, and hilarious cat videos) over the internet. Firstly, you will have an exponentially larger number of intermediaries, which increases the risk of downtime, interception, hacks and other interference with your traffic. If your connection is direct, you avoid those issues. Secondly, if you are transmitting all of your data via the internet it would be negligent to leave it unencrypted (due to those same risks). But it is impractical (and maybe impossible for the next few years) for you to ensure all of your data is encrypted without making your whole system run agonisingly slowly. Thirdly, if you are able to establish a direct connection to your data centre through the internet, then so can the terrorists (or any 13-year-old with too much time on their hands).

Layer 1 and 2 connections are generally going to be too expensive to run from your office to anywhere other than a data centre inside your city.

**Your chosen data centre is in New Zealand:** If you have a Layer 1 or 2 connection, it will be in New Zealand (and will probably be inside your city for cost reasons), because you cannot have those types of connections overseas. Plus, you are unlikely to get a fast enough connection if you are trying to store and access all your material from the other side of the world. Generally speaking, the speed and jurisdictional issues make it a very bad idea to use servers in an overseas data centre (like Amazon Web Services) as your primary storage location (although one exception might be ActionStep, a web-based practice management tool – the fact it is web-based imposes certain speed limits but if those are acceptable to you, it is worth investigating). If you are looking at using more limited cloud services for some client or firm data (like document collaboration), read the NZLS cloud computing practice briefing for more information and some other tips (http://bit.ly/1mBsnMR). Subject to privacy considerations, and provided you are willing to bring enforcement proceedings overseas in the event of a problem, you could make use of limited overseas-based cloud services.

**Cheaper or similar cost:** If the cost of buying new servers every five years or so is less than or equal to the total cost of a data centre for the same period, you will need to weigh up whether the flexibility and resilience of a data centre is valuable enough to tip the scales in favour of a move (of course, choose a trustworthy company staffed by experts with high-end hardware, not a 21-year-old grad running a server farm in his garage).

If you can meet those four conditions, at the very least you should be investigating the practicalities of moving to a data centre when your servers start approaching their retirement date. You can make use of your old servers as a backup system if they are still functional.

**Contractual issues**

When you are looking at the contract between you and the data centre, consider the following. Firstly, read the Privacy Commissioner’s cloud computing checklist (http://bit.ly/1muyM4).

Secondly, ensure you get a contractual term that prohibits any access by data centre employees to your data. They will probably want a clause that allows monitoring of usage patterns, but there is no reason they need to have access to the data itself, or any metadata (except perhaps in very limited circumstances). You should also get a contractual commitment that all data will be kept confidential, and ensure that those terms are sufficient to meet your own ethical obligations.

Thirdly, work through what is going to happen when the contract ends (whether that is because you part ways amicably and want to transfer your backup arrangements to ensure that, if disaster strikes, you do not lose everything. Finally, you can expect fairly stringent limitation of liability clauses in the data centre’s standard contract. Often there is a liability cap based on some multiple of the monthly cost, but you might be able to negotiate that. If something goes wrong with the data centre, it could cost you a lot of money to put right. What happens if a rogue data centre employee gets their hands on a confidential spreadsheet and releases it? The provider might increase the liability cap for a small increase in the monthly fee. Alternatively, you could talk to your insurer about the cost of covering this risk (if it is not already covered).

**Summary**

A specialised data centre is going to provide you with a better product and is likely to be cheaper than replacing your own servers (or of a similar price). Do it, if the cost is acceptable, but give some real thought to the contractual issues and do not compromise your ethical obligations.

I am happy to answer queries about this topic for those interested or confused. Email me at andrew@wrmk.co.nz.
Mediating in the future

By Nathan Speir, Senior Solicitor, Rice + Co

Technology is part and parcel of modern life. With the swipe of a finger, anytime and from anywhere, we can have instant access to a rich, global catalogue of information via the internet.

We have adapted our personal lives to accommodate developments in technology. Trips to the local bank to transfer money are largely a thing of the past, map books have been replaced by an App and communicating with someone on the other side of the world is no longer done by blue aerogram.

Technology is also changing the way the legal profession operates. In the litigation/dispute resolution sphere, the internet has given rise to a new phenomenon known as “Online Dispute Resolution” (ODR).

As the name suggests, ODR is a marriage between technology and dispute resolution processes such as negotiation, mediation and arbitration. It is growing in popularity overseas but has yet to catch on in New Zealand. The purpose of this article is to explain what ODR is, how it might have practical application in this country and to let you know that it is coming, whether we like it or not.

What is ODR?

ODR is fundamentally a dispute resolution service run over the internet. It is a reasonably new concept in the world of conflict resolution. A person born when the term ODR was coined in the mid-1990s would still barely be able to order a drink at a bar in New Zealand.

ODR exists in a variety of forms overseas. There is text-based ODR, video conferencing services and a plethora of offerings in between. One of the most recognised providers of ODR is eBay, the global e-commerce giant.

Following a pilot in 1999 that offered an online, text-based mediation service to resolve disputes between buyers and sellers, eBay incorporated the service within its framework. In 2010, eBay recorded having mediated online a staggering sixty million disputes between its members. The use of the service continues to grow.

It is not just disputes that begin online that are suitable for resolution using the digital medium. In the United States, government agencies, such as the National Mediation Board and the Office of Government Information Services, have adopted and are promoting ODR as an effective method of resolving problems. In New York, ODR is used to settle “pot hole” disputes with local governments and some believe that public use of ODR in the US is set to skyrocket.

ODR could be offered by a private service provider or incorporated as part of the current Ministry of Justice framework. The possibilities are endless.

ODR – the positives

Obvious advantages of ODR include potential cost and time savings because geography no longer poses a problem. There would be no need to find a suitable venue to host the mediation. Participants could join via their computer, tablet or smartphone from wherever they are and a mediator could be sourced from another city (or even country) if availability became an issue.

The system could be tailored to the dispute at hand and simplified as needed. It could mirror the functionality of frequently used social media, online banking and other websites and Apps, which many of us use and are familiar with. There is also scope to incorporate unique features such as a “chat” window that would allow parties to caucus and speak to a particular person or with the mediator during a mediation session.

Moreover, all documents that are to be relied upon during the mediation could be uploaded and accessed by all parties. The website could become a complete case management hub for convenience, functionality and, ultimately, cost savings.

ODR – the criticisms

Is ODR a solution in search of a problem? Some might argue there is no need for ODR because mediators and arbitrators already meet the demand. Mediators and arbitrators do an important job but it is questionable whether, as conflict and mediation become more prominent, they will always be able to keep up. Furthermore, as people become more expectant of technology in business and professional services the industry could find itself being left behind.

A likely criticism is that not everyone has access to, or is competent with, computers and technology. While this argument might be valid today, the writer has no doubts that tomorrow’s generation will be well-equipped.

A likely criticism is that not everyone has access to, or is competent with, computers and technology. While this argument might be valid today, the writer has no doubts that tomorrow’s generation will be well-equipped.

Could ODR lead to security/privacy issues? The simple answer to this question is yes. Security and privacy issues are the Achilles’ heel for ODR – the positives

ODR could be offered by a private service provider or incorporated as part of the current Ministry of Justice framework. The possibilities are endless.

ODR – the positives

Obvious advantages of ODR include potential cost and time savings because geography no longer poses a problem. There would be no need to find a suitable venue to host the mediation. Participants could join via their computer, tablet or smartphone from wherever they are and a mediator could be sourced from another city (or even country) if availability became an issue.

The system could be tailored to the dispute at hand and simplified as needed. It could mirror the functionality of frequently used social media, online banking and other websites and Apps, which many of us use and are familiar with. There is also scope to incorporate unique features such as a “chat” window that would allow parties to caucus and speak to a particular person or with the mediator during a mediation session.

Moreover, all documents that are to be relied upon during the mediation could be uploaded and accessed by all parties. The website could become a complete case management hub for convenience, functionality and, ultimately, cost savings.

ODR – the criticisms

Is ODR a solution in search of a problem? Some might argue there is no need for ODR because mediators and arbitrators already meet the demand. Mediators and arbitrators do an important job but it is questionable whether, as conflict and mediation become more prominent, they will always be able to keep up. Furthermore, as people become more expectant of technology in business and professional services the industry could find itself being left behind.

A likely criticism is that not everyone has access to, or is competent with, computers and technology. While this argument might be valid today, the writer has no doubts that tomorrow’s generation will be well-equipped.

Could ODR lead to security/privacy issues? The simple answer to this question is yes. Security and privacy issues are the Achilles’ heel for ODR – however, the risks can be mitigated. We bank online and use our credit cards to pay for things online. The sensitive information we divulge using these services is, for the most part, handled appropriately. It is therefore not difficult to imagine the same being the case for ODR.

Conclusions

To some readers, ODR may seem like science fiction. However, to think that ODR is not coming to New Zealand may be naïve. Certainly, there are issues to work through and perhaps we are not quite ready for it in this country. However, in the not too distant future, ODR will inevitably carve its place in New Zealand’s dispute resolution landscape.
It is probably a little-known fact that New Zealand has a growing industry of highly profitable digital games studios that are internationally renowned. New Zealand is an early adopter of new technologies and digital distribution, such as online and mobile gaming. In 2013, New Zealand-made mobile games were downloaded over 130 million times, six New Zealand-made games reached the Apple iTunes App Store Top 10 charts, and three New Zealand-made games were selected by Apple among the “Best of 2013”.

In 2012, Flightless, a successful New Zealand design and independent games studio, topped the App Store charts with its “Bee Leader” game – an iPhone and iPad game which involves controlling a honey bee through various levels of the game collecting nectar. Bee Leader was released by Flightless on the App Store globally in mid-2012 and had considerable success, including being awarded as one of the “App Store Best of 2012” games and the “App Store Free App of the Week” in May 2013. It was the number one App in six countries, a “Top 10 iPhone App” in 53 countries and a “Top 10 iPad App” in 87 countries.

Earlier this year, Flightless became the target of a Slovakian App developer who copied certain aspects of the Bee Leader imagery and branding.

**Bee Leader vs Flappy Bee**

While the Bee Leader App was available from the App Store, a new App called “Flappy Bee” was launched by a Slovakian software designer. Flappy Bee was an App that had been introduced to capitalise on the success of the internet sensation “Flappy Birds”. Flappy Bee sought to imitate the game play of Flappy Birds and Flightless had no concerns with this. However, in its rush to the market, Flappy Bee’s creator copied Flightless’s distinctive Bee Leader icon and text from its App Store page.

In the fast-moving App industry, days matter. The highly addictive Flappy Birds App was reportedly downloaded 50 million times within a month and its creator was earning $50,000 a day from selling in-game advertising. Once Flappy Bird was pulled from the App Store by its owner, Flappy Bee quickly rose to be the fourth most downloaded free App from the App Store. Given the number of downloads, Flightless needed to act fast in order to prevent its Bee Leader App, and the reputation that it had established, from being swamped by the success of Flappy Bee.

**Establishing a copyright claim**

As Flightless had no trade mark registrations in New Zealand, Europe or the US, one of the options available to it was to claim copyright infringement. The icon image adopted by Flappy Bee was identical to that of Flightless’s Bee Leader App. Flappy Bee also used almost identical wording to that previously used by Flightless to describe its App on the App Store.

The underlying drawings for Flightless’s Bee Leader icon were created by Flightless’s employees from their own effort, judgement and skill. Thus it was able to establish originality and ownership of copyright in the drawings and written descriptions as artistic and literary works respectively. Further, a comparison of the work clearly evidenced that the Flappy Bee App reproduced Flightless’s artistic copyright work as a whole, and a substantial part of Flightless’s literary work. Given the availability of the App and artwork/description on the App Store, and (to quote the Court of Appeal) the “multiplicity of coincidences” between Flightless’s works and Flappy Bee, it was fair to infer that the creator of Flappy Bee copied Flightless’s works (see *Thornton Hall v Shanton* [1989] 3 NZLR 304 at 312).

The next challenge was how to approach the creator of Flappy Bee to convince him to immediately redesign the Flappy Bee icon and change the description.

**Routes to resolve the infringement**

There were two routes open to Flightless. First, it could (and did) proceed via Apple’s iTunes Content Dispute portal to try and have Flappy Bee remove its infringing content. Like many online marketplaces (such as the Google Play App store, TradeMe and eBay), Apple offers a service to try and resolve intellectual property disputes between users (including developers) of its App Store. Apple’s role in its content dispute process is to act as a conduit between the IP owner and alleged infringer. Apple does not seek to arbitrate the dispute and, if the matter is not resolved between the parties, Apple reserves the right to pull the Apps of both the IP owner and alleged infringer from the App Store.

Secondly, Flightless could (and did) write to the Slovakian developer directly and have him update his App to remove the infringing material. Given however that the act of the copying of Flightless’s copyright works occurred in Slovakia, and not New Zealand, copyright infringement was claimed under Slovakian law. Copyright infringement was also claimed under New Zealand’s *Copyright Act* in respect of the communication of the copyright works from the New Zealand App Store to the public.

This illustrates the benefit of relying on copyright to enforce Flightless’s rights. Flightless’s exclusive rights (under copyright) in its artistic and literary works extended to all Berne Convention and WIPO Copyright Treaty 1996 countries, including the Slovak Republic and the United States. The Slovak Republic’s *Copyright and Rights Related to Copyright Act* 2003 granted copyright in works (including drawings and literary works) protected under international treaties to which Slovakia is a signatory (which included the Berne Convention Countries and TRIPs). The rights granted to Flightless include, among others, the exclusive right to reproduce and communicate to the public its Bee Leader icon.

Given Flightless’s rights in its works in Slovakia, the developer was requested to immediately cease using Flightless’s copyright works. Within a couple of days of receiving the letter, the developer issued an update removing Flightless’s works. Game over.

**Copyright infringement, mobile Apps**

“Flightless” but not “toothless”

By Edwin Lim, Partner, and Mark Heine, Senior Solicitor, at Hudson Gavin Martin

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Information security, legal practice

IT and security issues facing law firms

By Arran Hunt, Solicitor, MacDonald Lewis Law

For years, people were unwilling to use a credit card online but were happy for a waiter to carry their card out of sight. They were willing to conduct business by letter but, even now, an email will not be considered notice under most contracts. People fear the unknown, and for many the internet is very much an unknown—an unrecognisable country populated by shadowy characters.

However, I will not say that the fear is unfounded. Every second there are numerous attacks happening around the internet (see http://map.ipviking.com/ for a realtime map of just some of the detected attacks). While it can be a great resource, every user and firm should be vigilant in the security they have in place, both in the digital space and in the physical world.

Real world

Security should begin in your workplace. While there is a risk of someone hacking into your network, it would be much simpler for them to break a window and steal a server, gaining access to all of the client records contained within. A monitored alarm should be installed in all offices which would, hopefully, keep most criminals away. Cameras are also cheap to purchase and can be set to record video outside of regular office hours, or tied to record only when the alarm is on. Files stored on the server should be encrypted to restrict easy access to them, as should all backup devices that are taken off site (one backup device stolen from a vehicle could mean your clients’ files being uploaded to the internet).

Passwords

Passwords should NEVER be written down anywhere. This includes on whiteboards, postits attached to screens, stuck to the bottom of keyboards or inside a drawer. If you do need to store a list of passwords for any reason, then these should be stored in a secure location. There are a number of Apps available for smartphones that allow you to encrypt information, securing your passwords while not allowing access and preventing access if your phone is lost or stolen (you can also remotely wipe most smart phones if the capability has been enabled).

Staff should be encouraged to use inventive passwords, with a move towards the use of “pass phrases” rather than passwords. “Germany won the World Cup” is reasonably easy for a user to remember and receives a 94% security rating on http://www.passwordmeter.com/, without requiring any fancy characters or strange placements of capital letters. As a password, it is rated as more secure than “M1nKeY!@”, despite being much easier to remember and type. While modern password hacking algorithms are now working towards breaking pass phrases, any password with a space in it still provides a higher level of security.

Some firms set IT policies in an attempt to encourage better security, such as requiring users to change their password every 30 days. Such policies generally receive poor feedback with staff as the frequent changes often lead to passwords being forgotten. They also lead to lazy passwords from staff who will update their password by changing a number at the end, for example by changing it from “hello?” to “hello8“. IT-literate staff will also get past such requirements by changing their password 10 times in a row (being the typical number of historical passwords kept on record), allowing them to be back to their original password within a matter of minutes. Very strong passwords (pass phrases) that are easy to remember are better than passwords changed frequently that cannot be remembered and are therefore usually written down.

Remote access

It is not uncommon for IT staff to need to access a server or PC remotely. Doing so can allow them to quickly fix issues with a server or to configure or fix PCs without the time delays and costs in travelling to your premises. It is often the best solution as it can allow a repair to be done almost instantly.

However, there is a concern as to whether remote access should be possible without user interaction. Some access methods require the user to confirm the access each time it is to be used, or to provide a code to the IT staff to allow them to connect. This allows the firm to prevent remote access unless it is specifically required by the firm at that time. Other systems allow support staff to login when required without requiring a local user to interact to allow the connection. While this allows work to be performed by the IT support staff outside of normal hours, it does raise the question as to whether law firms should permit such unrestricted access to PCs within the network. While the writer believes that such access is against the idea of a secure office, it should be a question answered by each firm depending on its size and the availability of IT support. Any person with access to client files should be thoroughly vetted and be trustworthy.

Security should also be considered for mobile devices, which will often have access to the owner’s work emails. While it cannot be expected that users will enter in a security code with the same length and complexity as used on their PC, some type of pin or swipe security (where users move their finger over the screen, following a particular pattern) should provide some protection from opportunist thieves (or curious friends). What is more important is the need to be able to remotely disable mobile devices, often referred to as a “kill switch”. This allows a user to remotely lock the device over the internet, preventing any access to its contents. This was introduced by Apple in iOS 7, which should now be installed on most Apple devices. Google and Microsoft are introducing similar features to Android and Windows Phone respectively. There are also a number of Apps available for Android which already allow this. One example, which the writer personally uses, is “Avast! Anti-Theft”, which can also remotely erase a stolen phone, provides notification of a change in SIM card and allows for the remote deletion of the phone through sending a certain text message, erasing all data even if the SIM card is changed. However, for most phones, the kill switch is activated through data connections, so it is important that all phones have data switched on with data credit available.

Alternative security methods

As people need to remember, and enter, more and more passwords, there are always attempts to find simpler methods to provide security. However such attempts have typically provided less security, with the use of face recognition on phones and laptops being shown to unlock devices for similar looking people or even photos. Finger print scanners, while using a unique print, are useful for keeping out casual thieves but are easily passed by determined individuals, especially as the shiny outside of a smartphone will usually have a selection of fingerprints from which a thief can take copies. One more recent idea is identification through the use of a “Near Field Communication” or “NFC” tags, similar to those found in Tap-And-Go payment systems, which require a card or device to be held next to a reader to identify the user. These can now been found in a number of Android smartphones (it is rumoured that the iPhone 6 will also contain an NFC device) and can be found in key fobs and even rings such as provided by NFCRing http://inferring.com/. These can provide a simple way to identify a user but will require a reader on the PC or smartphone to connect with (some smartphones and laptops have NFC built-in or it can be provided through a device plugged into the USB port) and the identification devices are still prone to theft and loss.

Conclusion

Client confidentiality requires proactive security. However, as we straddle both the physical and digital worlds, we need to ensure that all aspects of security are looked at and vigilantly maintained.
**Procedure, discovery**

**Recent approaches to electronic discovery**

By Judge David Harvey

The High Court Amendment Rules (No 2) 2011 came into force on 1 February 2012 and made significant changes to the existing High Court Rules (HCR) for discovery and inspection. New duties required the preservation of documents and the disclosure of documents when pleadings are filed. A discovery checklist is required to be provided and parties may then be required to make standard or tailored discovery. A new listing and exchange protocol was introduced, with inspection to take place by way of electronic exchange.

Two major themes underpin the 2011 amendments, largely found in HCR 8. The first is that the adversarial approach to discovery has been replaced by one of co-operation and consultation between counsel. The second is that the extent or scope of discovery must be reasonable and proportionate. The volume of information to be considered in these days of electronic storage, across a number of devices, means that alternatives to manually identifying and sorting information must be employed to reduce volume and increase relevance.

**Key changes in the HCR**

Parties must co-operate in order to ensure that discovery is proportionate and facilitated by agreement on practical arrangements (HCR 8.2). As soon as litigation is reasonably contemplated, prospective parties to that litigation must take all reasonable steps to preserve documents that are reasonably likely to be discoverable (HCR 8.3).

The plaintiff must make initial disclosure of documents referred to in a pleading or used when preparing the pleading. The disclosure must be made at the time that the pleading is served (HCR 8.4). The parties must discuss and endeavour to agree on an appropriate discovery order prior to the first case management conference, addressing a new discovery checklist set out in the rules (HCR 8.11). At the case management conference, the judge may dispense with the discovery, order standard discovery, or order tailored discovery (HCR 8.12). Standard discovery requires the production of documents that the party relies upon or that adversely affect that party’s (or another party’s) case (HCR 8.7).

Tailored discovery is presumed to apply instead of standard discovery if the costs of standard discovery are disproportionate to the matters at issue, if there are allegations of fraud or dishonesty, where the sums at issue exceed $2.5 million dollars, or where the parties agree. Tailored discovery may involve more or less discovery than standard discovery. Tailored discovery requires discovery by category or by some other method that facilitates the identification of particular documents (HCR 8.8 - 8.10).

The parties’ obligation to conduct a reasonable search for discoverable documents is now specified in the rules (HCR 8.14). Documents must be listed in accordance with a new listing and exchange protocol, unless the parties agree otherwise (HCR 8.15, 8.16). Inspection now takes place by way of an electronic exchange of documents, unless the court orders otherwise (HCR 8.27). This means that paper documents must be scanned electronically so that electronic copies can be exchanged.

The amendments relating to discovery were designed to reduce disproportionate costs, delays and tactical use of discovery. Whilst the HCR now impose additional upfront costs on parties, especially in relation to the preservation of documents and the need for early discussion and agreement on discovery and inspection issues, it is assumed that these costs will be offset by savings later in the process. The reform of the rules relating to discovery is not unique to New Zealand. Australia, England, Canada, and the United States have all reformed their discovery rules to various degrees.

A theme that runs through the new discovery rules is the need for efficient and effective use of technology. HCR 8.2(2)(c) requires the parties to ensure technology is used efficiently and effectively where appropriate. It is essential that counsel be at least aware of and understand the various technological means available to reduce volume and increase relevance in the quest for a reasonable and proportionate approach to discovery. In its consultation paper (“Proposals for Reform of the Law of Discovery including Electronic Discovery and Inspection”), the Rules Committee observed that: “technology can provide more accurate solutions which can assist in identifying the most important documents more quickly … the move to electronic discovery does no more than reflect what is happening in the profession in any event:”

**Electronic discovery and ESI**

Electronic discovery or e-discovery describes the methods by which the parties use electronic means to assist in finding, identifying, locating, retrieving, reviewing, listing or exchanging documents to satisfy discovery obligations. In New Zealand, electronic listing and exchange will generally be mandatory. Although it is not necessary to use electronic methods to find, identify, locate, retrieve or review documents, these methods may in fact help reduce costs in some cases.

Information that is stored electronically is known as “electronically stored information” or “ESI”. ESI is any information that a client may store electronically and is wide-ranging. It may include email, SMS text messages, voice mail, instant messages, word-processed documents, spread sheets, databases, images such as JPEG or TIFF files, PDFs, electronic calendars, audio files and internal and external web sites. In addition to documents that are readily accessible from computer systems and other electronic devices and media disks, ESI includes documents stored on servers and backup systems and electronic documents that have been deleted. It also includes metadata and embedded data.

**Types of data covered**

Documents can be exchanged electronically either in native format or in PDFs. If emails are exchanged in native format they can be viewed by opening them in an email client. However if emails are exchanged in PDFs, an electronic photocopy of the email is created and can only be viewed by looking at the PDF. The HCR include a helpful glossary to assist lawyers in understanding some of these technical terms.

The glossary defines “metadata” as “data about data”. It states: “in the case of an electronic document, metadata is typically embedded information about a document that is not readily accessible once the native electronic document has been converted into an electronic image or paper document, for example, the date on which the document was last printed or amended ... Depending upon the circumstances of a case, metadata may be discoverable.”

“PDF” is defined as: “PDF (portable document format) is a file format that enables documents to be displayed or printed in a manner that preserves the format originally used by the author”. A PDF file may be either a searchable image file or an unsearchable image file.

The HCR also differentiate between “primary data” and “non-primary data”. Primary data is data that is readily retrievable, whereas non-primary data is generally archival data that is not readily retrievable. Many organisations use backup tapes to make a full copy of an employee’s electronic data for disaster recovery purposes. These backup tapes contain archival data and are not readily retrievable and are not primary data for the purposes of the HCR.

Another important concept is that of “native format”. The glossary describes this as “an electronic document stored in the original form in which it was created by computer software programme”. Lawyers will often create a document in Microsoft word and then convert it into a PDF before emailing the document. This is because the PDF preserves the original formatting and cannot be edited. It also eliminates much of the metadata underlying the word document. The native format of the document in such a case as the Microsoft word format and not the PDF format.

**Discovery checklist**

The HCR “Listing and Exchange Requirements” provide some guidance as to what is required for the discovery checklist. Parties are encouraged to use native electronic versions of documents as much as possible, use the extracted metadata from native electronic documents instead of manually listing documents, convert documents to image format only when it is decided they are to be produced for discovery, and only number images if they are to be produced for discovery.

The discovery checklist also addresses the issue of tailored discovery and identifies methods and strategies for locating documents. The parties must seek agreement on the methods...
Copyright and the digital economy

Should New Zealand adopt “fair use”? by Melanie Johnson, ADLSI Technology & Law Committee Convener and legal counsel at the University of Auckland

In this article I attempt to open up discussion on whether or not New Zealand should consider adopting a “fair use” exception based on the US model, as has been recommended for Australia by the Australian Law Reform Commission (ALRC), or whether we should follow a more prescriptive model, such as that recommended by the Hargreaves review of the UK Copyright Act, which recommended changes to its Copyright Designs and Patents Act 1988 based on a fair dealing model.

Given New Zealand’s closer economic ties to Australia and the agreement to harmonise our laws, the question arises as to whether New Zealand should also adopt a fair use exception. Some may argue that to maintain an edge in a fast changing world of electronic innovation, we must provide our entrepreneurs with the tools to fuel growth. Others may argue that our Copyright Act 1994 (Act) has already made changes to encourage growth and the Act only needs fine-tuning. Given that a review of the Act is well overdue, Australia’s proposal provides a good impetus for us to start considering what changes are needed in New Zealand and whether a fair use exception would in fact fuel innovation and growth or shackle us to the uncertainty of judge-made law.

Recommendations in Australia

On 13 February 2014, the Australian Attorney General released a report by the ALRC on “Copyright and the Digital Economy” (Report). The ALRC noted that: “Copyright is an essential aspect of innovation in the digital environment... At present, copyright law gets in the way of much innovative activity which could enhance Australia’s economy and consumer welfare. Reform of copyright law could promote greater opportunities for innovation and economic development.”

The ALRC recommended that the Copyright Act 1968 (Cth) provide an express statement that fair use of copyright material does not infringe copyright and a non-exhaustive list of fairness factors to be considered in determining whether or not a use is fair (including purpose and character of the use, nature of the copyrighted material, amount and substantiality of the part used, and the effect of the use upon the market for or value of the copyrighted work). A proposed non-exhaustive list of illustrative uses or purposes that may qualify as fair use would include research or study, criticism or review, parody or satire, reporting news, professional advice, quotation, non-commercial private use, incidental or technical use, library or archive use, education and access for people with disability.

The recommendation that Australia adopt a “fair use” exception (based on the United States model) has been greeted positively by those institutions and businesses which rely on the use of third party copyright material, and who must either act outside the law or who are unable to make full use of innovations in digital technology as it arises.

Position in New Zealand

In 2007, the New Zealand Government reviewed the implications of digital technology for the Act, which resulted in the Copyright (New Technologies) Amendment Act 2008. At the time the amendments were enacted, the Government agreed the Act would be reviewed by MBIE to assess its effectiveness for digital technology in 2013. However, this review will not now take place until the conclusion of the ongoing Trans-Pacific Partnership (TPP) Negotiations. How this will affect New Zealand’s ability to introduce changes is uncertain. The US is a party to the TPP Negotiations and will push for changes to our intellectual property legislation that would protect US interests. The Office of the US Trade Representative (USTR) advised that it actively pursues robust intellectual property chapters in its trade negotiations, including the TPP, to ensure that US exports of IP-intensive products are protected.

Leaked documents have indicated that the US seeks a number of amendments to copyright legislation of parties to the negotiations, including extending the period of copyright protection to 70 years plus life, and either 95 or 120 years after publication for corporate works. It would also treat temporary reproductions of copyright works without copyright holders’ permission as copyright infringement, without the adoption of a fair use defence. The growing opposition to the TPP both within the US and amongst its trading partners, means it is unlikely that the agreement will be concluded in the short term.

The Honourable Craig Foss, Minister of Commerce, has observed there is significant public demand for a broad review of the Act which stems from “a public perception that New Zealand consumers suffer from a lack of access to copyright content and flexibility to use this content how they wish in the digital environment”. However, a broad review of the Act is unlikely to happen so long as New Zealand pushes for access to the US market. Delaying a review of the Act may not be in our best interests: “The size of our islands, our geography and our skills suggest we may be advantaged most by selling our brains and our patents, not shiploads of machines. We have the potential to become a nation of new ideas and fundamental research but we do not have sufficient industrial mass to be a modern Pittsburgh.” (Professor John Evans, “Let’s take our brains to the world”, NZ Herald, 18 October 2013)

Which approach should we follow?

New Zealand’s distance from the US and Europe means our future lies in high technology exports and this should not be traded off for access to the US market for our primary produce. The Minister of Commerce has indicated that New Zealand is more likely to follow the recommendations in the UK Hargreaves Review, because our Act is largely modelled on the UK legislation and is therefore more likely to suffer from similar issues as those experienced in the UK.

Given that New Zealand’s primary trading partners are Australia and Asia and we are looking to increase trade with the US, we should be questioning whether it is still appropriate that we are referring to the UK Copyright Act when looking to amend our own Act. New Zealand does not suffer the same restraints as the UK which is constrained by European Union law. Although the Hargreaves Review considered whether the more comprehensive American approach to copyright exceptions, based upon the so-called “fair use” defence, would be beneficial in the UK, it was concluded that importing fair use wholesale was unlikely to be legally feasible in Europe, and that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners.

If New Zealand does follow the recommendations of the Hargreaves Report, New Zealand could well be disadvantaged. Many of the exceptions proposed by the Hargreaves Review already exist in New Zealand, such as the digital preservation of works held in libraries. However, more could be done in this sphere in New Zealand. While it is clear that an efficient licensing model will promote traditional uses of copyrighted works, it is difficult to see how the modest changes implemented in the UK that rely on licensing by the copyright owner would facilitate the range of emerging technologies that have come out of the US in recent years in reliance on the fair use defence.

The “fair use” defence

Edward Black from the Computer and Communications Industry Association maintained that the defence of fair use was particularly important: “The same fair use principle that saved home video has also served MP3 players, DVRs, smartphones and a considerable portion of modern Internet

Continued on page 14
NZLII: Ten years and growing

By Mark Donovan, Barrister, and Donna Buckingham, Associate Professor of Law at the University of Otago

Many lawyers will be familiar with the New Zealand Legal Information Institute’s website www.nzlII.org.nz, commonly known as “NZLII”. For 10 years, NZLII has been serving practitioners and the public with a searchable, online repository of current case law, legislation and legal scholarship at no charge. But few will be aware of its ethos, scope of information available and how they might be able to help sustain this valuable public service.

Origins and ethos

Donna Buckingham, Associate Professor of Law at the University of Otago, was the driving force behind the formation of NZLII a decade ago. Recognising the inherent public benefit provided by similar online resources in other jurisdictions, she advocated for New Zealand to have its own designated portal.

Since its inception, NZLII has grown to encompass over 140,000 documents drawn from 95 separate databases, comprising documents received from courts, tribunals and statutory bodies such as IPONZ, as well as historic legislation, law reform reports, law reviews and treaties.

As a member of the “Free Access to Law Movement” (FALM) – a loose confederation of around 50 similar institutes around the world – NZLII subscribes to the principles of the Montreal Declaration on Free Access to Law. Those principles include a core commitment to maximising access to public legal information by digital means and at no cost, with a view to promoting justice and the rule of law.

There is co-operation among the institutes who are party to FALM. In particular, NZLII benefits from the assistance provided by its sister institute across the Tasman, AUSTLII, which hosts and maintains the NZLII databases on its servers in Sydney.

How it works

Of course, a database collection like NZLII is only as good as its content. NZLII has seen increasing success by making arrangements for various courts, tribunals, statutory bodies and other legal information providers to make electronic copies of cases or decisions available to NZLII for publication. In some cases, agencies are glad to cooperate because, by publishing their content on NZLII, they fulfil any obligation they may have to provide public access to their decisions. In other cases, such as the several databases maintained by the University of Canterbury, NZLII facilitates access to material essential for teaching and research as well to provide public access.

Where possible, the suppliers upload their documents directly to the server in Sydney, making the process extremely efficient. In other cases, once the documents are received, Associate Professor Buckingham co-ordinates a small band of volunteers who review the documents, convert them if necessary to enable full-text searching, and upload them to the NZLII website.

A popular service

The numbers prove the popularity of the service: in 2013 there were 5,071,217 requests for documents (or 13,893 requests per day). The greatest demand is for copies of High Court judgments, Accident Compensation Appeals decisions, Court of Appeal cases and access to historic legislation. Other popular databases are the Supreme Court, Environment Court, Coroners Court, Immigration & Protection Tribunal and Accident Compensation Appeal Authority. Clearly, the service NZLII provides is immensely valuable to the public, not to mention the legal profession.

“NZLII also provides a valuable resource for the Pacific jurisdictions,” Associate Professor Buckingham says, “many of which need access to New Zealand law. And increasingly it is acting as an archival collection for material that is otherwise inaccessible online.”

On a shoestring budget

Despite its popularity, most practitioners will be unaware that NZLII currently has no external funding.

Associate Professor Buckingham explains: “The New Zealand Law Foundation was the sole source of funding during NZLII’s first 10 years, providing an initial grant in 2007 and later three particular project based grants (for example, establishing coverage of ACC decisions). The Faculty of Law at the University of Otago has provided contributions in kind, such as administration of those funds without any cost and the provision of laptops on which data is prepared for uploading. Other than that, NZLII has survived on volunteer labour.”

“The Montreal Declaration promises that public access must be free – so we cannot ask anyone for payment for the data that they pull down from our collections,” says Associate Professor Buckingham. Having said that, the level of funding required to sustain the service is relatively meagre compared to the benefit it provides. Associate Professor Buckingham estimates that a dedicated team could operate the service effectively for less than $100,000 a year.

Unlike in Canada, where its Law Society (as regulator) is able to levy its members to maintain a similar online resource (www.canlii.org), Associate Professor Buckingham says the model of non-compulsory membership in the Lawyers and Conveyancers Act would prevent this kind of funding initiative – even though lawyers represent a high proportion of those who use NZLII and the annual cost to each lawyer would be equivalent to a couple of cups of coffee per year.

Looking to the future

As NZLII enters its 11th year of operation, Associate Professor Buckingham is hopeful that the site will move beyond relying solely on volunteer labour or the support of only the Law Foundation and the University of Otago. She is working towards broad-based support to ensure NZLII remains an active, ongoing resource. But practical help is needed from interested stakeholders, both in terms of funding and other assistance towards her vision of incorporating NZLII and acquiring charitable status in its own right.

“NZLII has an incredibly valuable role to play in providing successful access to legal material,” she says. “It must keep going. No other collection provides cross-database searching, comprehensive full text searching, and a mix of current and archived material on this free access basis.”

If any practitioners are interested in assisting NZLII financially, or wish to give practical assistance to help it achieve charitable status or further access to legal decisions, they should contact Associate Professor Buckingham directly by email (donna.buckingham@otago.ac.nz).
Melissa Fini, Manager of CPD & Learning Services at ADLSI, explores how technology, if adopted in a well thought out, dynamic and intelligent way, can enhance lawyers’ experience of CPD.

By choosing law as a career, lawyers commit to life-long learning: from school pupil, to law student, to legal practitioner undertaking Continuing Professional Development (CPD). A similar learning journey is likely to continue from schoolroom to practice – simply replacing the school teacher at the front of the room with a law lecturer and then a presenter at seminars, conferences and the like. Is it not almost shocking that, while the practice of law has evolved with technology (electronic libraries, e-dealing, e-discovery, etc), the approach to conveying information and learning for CPD has not?

Lawyers often have demanding and relentless workloads. While mandatory CPD provides an opportunity to ensure legal knowledge remains up-to-date, it is yet another thing to fit in one’s day. The key lies in using time effectively. This is where technology can provide a solution. ADLSI is committed to embracing innovation and technology wherever it will enhance lawyers’ experience of CPD. Here are some examples of our brave new world.

Provided that they are crafted to satisfy the interactive requirement under the CPD Rules, on demand recordings of one-hour webinars (and, for the daring, two-hour seminars) allow lawyers to use otherwise “dead” time (for example, commuting or while at the gym) to complete their CPD. ADLSI’s on demand offerings are not simply recorded events. They comply with the CPD Rules. Each on demand item contains questions relating to the material covered. The participant enters an answer which triggers the correct response and provides the underlying rationale, together with direction on where this is covered in the recording and supporting paper if the participant wants to revisit it.

ADLSI has received extremely positive feedback when trialling live streaming of its two-hour seminars. Live streaming enables lawyers throughout the country to “attend” the seminar via their computer. They engage remotely through tools such as a “chat box” where they can either raise questions for the presenters, or share information to resolve questions among themselves. If used sparingly (i.e. taking care not to “talk” while the “teacher” is!), the chat box serves as an excellent way of sharing information among peers to address issues they may have experienced in practice.

Even the widely accepted webinar has evolved. No longer are webinars simply a voice with PowerPoint slides. With the objective of replicating the “being there experience” as closely as possible, ADLSI has for some time included a video stream so that the presenters may also be seen. Poll questions raised to draw participation from “attendees”, together with a chat box for questions, also work well to engage with a live, even if remote, audience.

All is not lost for those who lament the social connection CPD engenders. Recognising that instruction in a group setting is an effective way of learning, ADLSI has led the charge by creating online group pricing for firms. This enables law firms to either arrange their in-house training around a live webinar or, alternatively, to purchase an on demand item for a group and slot that into their in-house training programme. Ideally, a facilitator from the firm would lead discussion (between themselves) on points of law raised during the presentation and the group could either collectively raise questions for the presenter at a live event, or work through the on demand questions together.

Quite commonly, lawyers cite the enormous cost and time savings (for example, travel and parking) as a key advantage in engaging in CPD through webinars, on demand and live streaming. These advantages are not to be underestimated when juggling a demanding workload and life beyond the office. Essentially, if used effectively, technology can support lawyers in their CPD, while connecting them with lawyers within their firm and wider New Zealand.

For more information on ADLSI’s CPD calendar and upcoming seminars and webinars, as well as on demand products available, please visit www.adls.org/cpd.
and strategies that are appropriate to conduct a reasonable and proportionate search for the documents that are identified, including appropriate key word searches, other automated searches and techniques including concept searching, clustering technology, document prioritisation technology, email threading, methods to be used to identify duplicate documents, and identifying when specialist assistance may be required to locate documents efficiently and accurately.  

**Strategies and methods**

Document review is the largest cost of the discovery process, although many of the costs can be avoided. Some lawyers are still using the same practices that they used when reviewing paper documents, adding unnecessary cost and burden to the discovery process. It is not unknown for the document review process to be carried out by printing out hardcopies of all the electronic material and then laboriously reading through document by document. To reduce the costs of discovery and to maintain the emphasis upon proportionality, it is important to reduce the volume of documents for lawyers to review. Much of the information that may be reviewed will be irrelevant or redundant duplicated information, and the solution is to address removing the information prior to starting the review.

Some tools and technologies are more effective than others. “Keyword searching” is a fairly blunt instrument. The difficulty is that it may result in irrelevant documents being identified because the keyword selected may have different meanings or be used in a different context to what is desired. The construction of the search itself is critical, together with having an understanding of the limitations of the method. Because of its limitations, keyword searching is not an ideal method of filtering documents and other automated searches (as discussed below) may be preferable. But, under the principles of the HCR, if keyword searching is to be used it is important to agree an approach with the other side to avoid conflict.

**Concept searching**

“Concept searching” can be useful when large volumes have to be examined and the search attempts to match results with the query conceptually. The methodology is based not upon keywords but upon the subject matter of the document paragraph or sentence. Concept searching adds additional information to basic keywords as it evaluates both words and the context in which they appear.

**Clustering**

“Clustering technology” can bring cost savings in the document review phase. Clustering groups documents by identifying conceptually alike documents and breaking them up into groups of similar documents. The technology is calculated upon keywords but upon the subject matter of similar documents. The technology is calculated through the mathematical relationship between the text context of the documents. There is an advantage with process in that similar issues can be investigated at the same time instead of reviewing different documents throughout the document review set.  

**Predictive coding**

“Predictive coding” or “document prioritisation technology” is particularly useful in the document review process and may produce accurate results, especially when there are large volumes of information. An initial document set can be reviewed by someone knowledgeable about the matter. The same irrelevancy calls are then carried forward to the remainder of the document set based on the results of the sample set. The software then prioritises or ranks the remainder of the documents based on the decisions made on the sample documents, which allows the most relevant documents to be identified first.

**Email threading**

“Email threading” allows the identification of related emails in a thread and can identify the email end point and the unique emails in the thread. Many emails contain earlier messages and are constructed in the form of a thread or a chain. By identifying the end point of the email chain, redundant emails do not have to be reviewed. The benefit of the technology is in the review exercise where parties can focus on the entirety of the email exchange instead of coming across many duplicated parts of the same exchange, thus moving through emails more quickly and allowing for accurate assessment.

**Duplication**

The checklist requires identification of duplicate documents. One way of addressing this is by “duplication”, defined in the glossary as the identification and removal of duplicate documents from a collection of documents so that one unique copy of each document remains. The glossary then becomes quite technical. It states “a cryptographographic hash function such as the message digest algorithms five (MDA5) may be used to generate a digital fingerprint for an electronic document. The digital fingerprint of a document can then be electronically compared against the digital fingerprint of any other document to determine whether the documents are exact duplicates”.  

“Near duplicate” identification is not mentioned in the particular methods and strategy section of the checklist but it is an important method to assist in the document review. Near duplicate technology identifies documents that have similar content although are not exact duplicates. The technology groups all of the near duplicates together so they can be reviewed at the same time, allowing the reviewer to quickly focus on the differences and move through the documents more quickly and accurately.

**Native file review**

Finally, “native file review” allows lawyers to view documents in the format in which they were intended to be viewed. Spreadsheets and databases, for example, may only be able to be accurately assessed in their native applications. This can have considerable cost savings. Converting all documents to PDF prior to the document review (rather than after it) will usually add unnecessary expense to the discovery process. It will usually be more efficient to review documents in their native file format and then only convert the relevant documents to PDF for the electronic exchange of documents.

**Case management**

The discovery checklist and the listing and exchange protocol do not, of course, stand alone. The checklist is in fact part and parcel of the preparation for the first case management conference (HCR 8.11). At the case management conference that the judge may either make an order dispensing with discovery, or make an order for standard discovery, or make an order for tailored discovery (setting out the categories or other method of classification by which documents are to be identified). Tailored discovery is clearly cost related (HCR 8.9(a)) and it is implicit that all parties, including the judicial officer, should understand the benefits, advantages and disadvantages of the various document sorting and review technologies that are available.

It is this writer’s view that some form of judicial education process in the operation of the various review technologies is going to be required, and will have to be quite detailed when it comes to assessing issues of cost and proportionality. The checklist makes specific reference to the issue of whether or not specialist assistance may be required to locate documents sufficiently and accurately. It is suggested that this specialist assistance will probably be in the form of a lawyer who has specialised technology skills in the discovery process. Such specialised assistants are going to have to be aware of the legal requirements of discovery, relevance, privilege and the like, along with having a good working knowledge of the HCR and an intimate knowledge of the appropriate technologies that may be available and can be used.

**Conclusion**

While technology has created problems in the discovery arena by vastly extending the scope of potential discovery, it may also be a solution to these increasing volumes. The technology must be used efficiently and effectively to enable a more proportionate and cost-effective discovery process. It may assist the parties in every aspect of the process – from the identification of information, through to its presentation in the courtroom. However, its main advantages are the cost benefits that it can bring at the initial stages.

Few firms will have the volume of litigation to equip themselves with all the possible tools to assist in their discovery obligations. Service providers or specialist assistance may therefore assist with the discovery process. For law firms, this will reduce any potential costs or infrastructure rearrangements that may be necessary. However, it must be made clear, and will be apparent from the preceding discussion, that the particular methods of discovery will depend upon the case in hand. Different products may be more relevant to the different parts of the discovery process.

One thing is clear – lawyers and judges are going to have to become intimately aware of the technologies that are available if the advantages of cost reduction and proportionality that underlie the HCR are to be achieved.
Continued from page 10, “Should New Zealand adopt “fair use”?

functionality, like cloud computing, that we depend upon today. In recent years, we’ve seen courts invoke fair use to validate a variety of transformative, socially valuable services.” (28 January 2014, Subcommittee on Courts, Intellectual Property and the Internet, US House of Representatives)

It is difficult to see how the licensing model espoused by the UK could produce the same innovative technological advances in New Zealand, as such a model relies on an effective watchdog (such as the Commerce Commission) to ensure abuses of market power by monopoly licensing bodies do not occur. In New Zealand, copyright licensing bodies are excluded from the ambit of review by the Commerce Commission by section 45 of the Commerce Act 1986. It is also difficult to envisage rights owners agreeing to the wholesale copying of their works under licence – not only would a rights owner not agree – if they agreed to licence the use, the fee would be prohibitively expensive.

The other difficulty with relying on exceptions to support technological advances is that they must be spelled out and it is difficult for legislators to envisage how copyright will apply to emerging technologies. Broad exceptions, such as those which allow for the digital copying without infringing copyright of an original item at risk of loss, damage or destruction and held in the collection of a library or archive, work well; however, more prescriptive exceptions do not. For example, the exception in section 44(1) has not kept pace with the way in which teaching is now delivered. Although staff can do anything for the purpose of giving a lecture including showing films, digital technology requires copying in order to play the extracts necessary for teaching purposes, and some courses are delivered entirely online. A fair use exception would permit such copying for educational purposes where there is no harm to copyright owners’ ability to monetise their work.

In New Zealand, fair dealing defences require an excused “dealing” to be both “fair” and fit within one of the following purposes: “criticism and review”, “reporting for current events”, or “research or private study”. Under the US system, any kind of use can be potentially fair and offers far greater flexibility than a closed list of “fair dealings”, while the sorts of educational uses referred to above would be covered by the defence, so long as the use did not economically injure the copyright owner’s work.

Section 107 of the US Code dealing with the fair use lists four factors that must be weighed together in considering fair use – the purpose and character of the use, the nature of the copyrighted work, the amount being used in relation to the copyrighted work as a whole, and the effect of the use upon the market for or value of the copyrighted work. US courts will firstly consider “whether and to what extent the new work is transformative” – that is, whether it merely “supersedes the objects” of the original or “instead adds something new, with a further purpose or different character, altering the first new expression, meaning or message” (Campbell v Acuff-Rose).

On 10 June 2014, the US Federal Court of Appeal issued its decision in the case Authors Guild v. HathiTrust (2d Cir. June 10, 2014), which upheld the right, under the doctrine of fair use, of the Hathi Trust, a non-profit educational collaboration, to provide a searchable online database of scanned copies of over 10 million literary works. The Court found that a use did not become transformative by making an “invaluable contribution to the progress of science and cultivation of the arts”. The Court went on to explain that “[a]dded value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.” The database did not simply reproduce the books but offered a “transformative use” of them: “By enabling full-text search, the HDL adds to the original something new with a different purpose and a different character.”

The Court also said the authors had to show how the library harmed them economically, because the search function is not a substitute for the books themselves. The Court validated the online database, claiming it did not violate copyright protections for authors whose works were scanned, because the database does not reproduce the books or provide actual text of the written work; instead it allows users to search for page numbers where specific text of the works can be found. Therefore, the Court claimed authors were not harmed economically.

In the digital world there is potentially the opportunity for rights owners to monetise every use of their content. Traditional exceptions in the Act that are there to encourage the creation of new works are being whittled away by rights owners who can theoretically use technology to license every last use of the works to which they control the rights. New Zealand’s Act already has a number of exceptions which do not require an assessment as to whether or not a use is fair. Such exceptions, for example, permit the decompilation of copyright-protected software in order to create an interoperable programme. In the United States this remains subject to the uncertainty of the fair use defence.

Conclusion

New Zealand should seriously consider also adopting a fair use defence as recommended by the ALRC. Although New Zealand has recently made some amendments to the current Act to encourage innovation, because of their prescriptive nature, these amendments are limiting the use of technology.

New Zealand’s current restrictive copyright laws mean we will not see the creation of another revolutionary innovative business such as Google on these shores. ☛

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Trevor Campbell Martin, late of 731C Remuera Road, Remuera, Auckland, Accountant, Aged 65 (Died 02/07/2014)
Gopalan Velu, late of 9 Norana Avenue, Favona, Mangere, Auckland, Aged 78 (Died 05/07/2014)