

Ecommerce and Intellectual Property

July 2003 Update

Landmark Decision in Privacy?

Does the common law protect your privacy?

For many years the view was there was no common law protection of a person's right to privacy.

With the advent of the new information age, the issue of privacy has been at the forefront of the minds of many people, including politicians. Politicians and law makers around the world identified not only the greater risk to privacy that the new technology brings but also many of the benefits that it can bring.

In December 2001, the Privacy Act 1988 was amended to expand the obligations of organisations collecting personal information. The amendments introduced the National Privacy Principles into the Act.

For many the question was whether the National Privacy Principles would have any teeth or simply amount to a toothless tiger. This issue is discussed further later in this update.

Now it seems that the courts are joining the privacy debate. In a case with some quite bizarre facts, the District Court of Queensland considered whether it should award

damages for invasion of privacy and if so, what those damages should be.

The Senior Judge, realising the ground breaking nature of the decision he was about to make said, *"It is a bold step to make, as it seems, the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy. But I see it as a logical and desirable step. In my view there is such an actionable right."*

According to the Senior Judge the judgments of the Justices of the High Court in *Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd* contained sufficient propositions to sufficiently identify the existence of a common law cause of action for invasion of privacy.

In what circumstance can someone bring an action for damages for an invasion of privacy? According to the Senior Judge, the essential elements for such an action are:

- a willed act by the defendant,
- which intrudes upon the privacy or seclusion of the plaintiff,
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,

What's in this Issue?

Privacy Damages - the beginning of a new era?	1
What's in a name? Privacy Commissioner's complaints statistics	2
	3

- and which cause the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

The Senior Judge did not rule out an action succeeding where the act of the plaintiff was negligent instead of a wilful act.

It would be a defence to claim if the invasion of privacy was an act taken in the public interest but it is not certain whether it would be a defence to claim that the person invading the other person's privacy was doing so to protect or benefit the other person.

What damages were awarded? The plaintiff was awarded \$178,000 in damages for breach of her right to privacy. \$108,000 of the award were compensatory damages, \$50,000 in aggravated compensatory damages and \$20,000 in exemplary damages.

What does this decision mean to you? Indications are that the decision is to be challenged.

As individuals, on the face of it, the decision may provide an important safe guard to the protection of your privacy. The irony is that to succeed in such a claim one has to go through the public ordeal of a court case. As mentioned earlier, the facts of the case were quite bizarre and one questions whether the plaintiff achieved any protection of her privacy or simply received damages.

For people or organizations that deal, collect or use personal information, or for employers that may be liable for the actions of their employees, the decision sounds a loud warning.

The decision was not completely unexpected but the appeal will be very interesting. Stay tuned!

What's in a name?

Pop star, Robbie Williams succeeded in having the domain name "robbiewilliams.com" transferred to him.

Cybersquatting is still alive and a problem, but are the WIPO decisions consistent?

In order for a domain name to be transferred from the registered owner to the person complaining about the registration, the complainant must prove that:

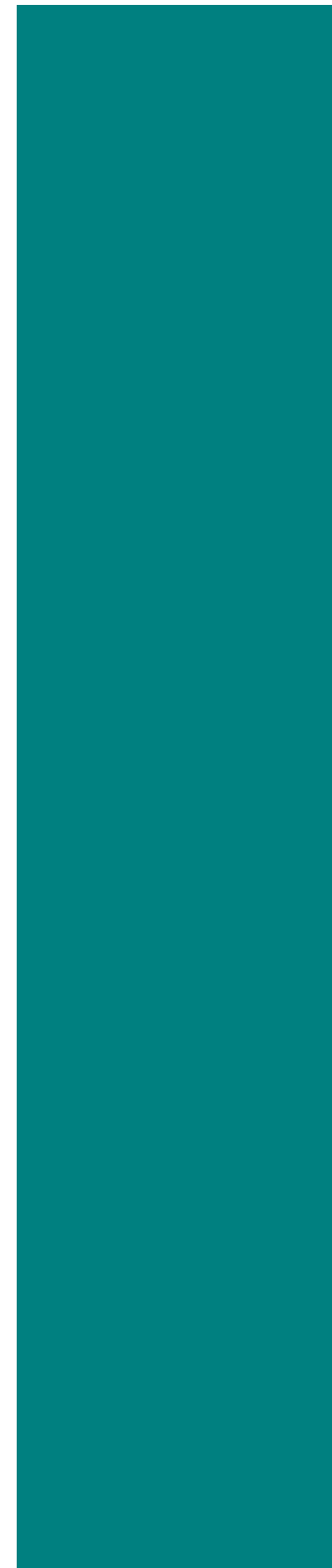
- the domain name is identical or confusingly similar to a trade mark or service mark in which the complainant has rights;
- the respondent has no rights or legitimate interests in respect of the domain name; and
- the domain name has been registered and is being used in bad faith.

In Mr Robbie Williams' case all of the above requirements were proved to the satisfaction of the panelist hearing the complaint.

You may recall however that Gordon Sumner, more popularly known as STING was not so successful in a similar case.

It is useful to highlight some important differences between the two complaints.

- Firstly STING did not have a registered trade mark. Not that that on its own would automatically preclude him from succeeding in his claim, as an unregistered mark would have been sufficient (see Julie Fiona Roberts v Russell Boyd).



But the word “sting” is a common English word with various meanings and so he did not satisfy the first requirement for a challenge.

- More importantly the panel was not satisfied that the domain name was being used in bad faith.

Although the person holding the domain <sting.com> offered to sell it to STING for \$25,000, that was insufficient to prove bad faith.

The panel seemed to focus on the fact that the actual use of the domain was not used to attract users for commercial gain.

But in the case of Robbie Williams, the single panel member stated that she considered it likely that the person registered the domain in order to sell it to Mr Robbie Williams or to a competitor for a sum exceeding his costs of registration or that he meant to prevent Mr Williams from reflecting his trade mark in the .info domain.

300% in 2001 – 2002 and increased by 500% in 2002 – 2003.

This is not surprising. It shows that as the community is becoming more familiar with their rights, complaints are exponentially increasing. Time will tell whether this trend will continue.

It would not be surprising for the amount of complaints to continue increasing at such rates if the people feel that their complaints are getting them somewhere or something. Organisations can also take steps to avoid the cost of and attention to dealing with such claims by reviewing their procedures and taking any necessary steps to avoid breaches.

It is not surprising that most complaints fall under the category of bad use or disclosure of personal information.

Privacy Commissioners Complaints and enquiries statistics?

The New Privacy Principles have been in force since 21 December 2001. What has been the impact of the changes?

According to the statistics released by the Privacy Commissioner complaints received increased by more than

Contacts

If you require assistance with any Ecommerce or Intellectual Property matter contact

Norman Donato
Partner

T: 9233 9031

E: ndonato@makdap.com.au

This update is a non comprehensive general outline of the law as at the date of this publication. You should not act upon or rely on any information contained in this update without obtaining specific legal advice.

This and other updates and publications are available from our web site www.makdap.com.au. If you would like to receive future issues of this update emailed to you please advise us by email addressed to marial@makdap.com.au.

To unsubscribe to further issues of this update, advise us by email addressed to marial@makdap.com.au or contact our privacy officer on 9233 7788.