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The Future of Cyberlaw – Playing 'Cheat the Prophet'

Abstract
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Keywords
internet legislation, privacy law, internet commerce, electronic commerce, cyberlaw

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My thanks to Jan McDonald and William van Caenegem for comments on an earlier draft of this paper.

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OPINION

THE FUTURE OF CYBERLAW – PLAYING 'CHEAT THE PROPHET'

By PATRICK QUIRK[*] Assistant Professor of Law, School of Law, Bond University.

> The human race, to which so many of my readers belong, has been playing at children's games from the beginning, and will probably do it till the end, which is a nuisance for the few people who grow up. And one of the games to which it is most attached is called, 'Keep tomorrow dark', and which is also named … 'Cheat the Prophet'. The players listen very carefully and respectfully to all that the clever men have to say about what is to happen in the next generation. The players then wait until all the clever men are dead, and bury them nicely. They then go and do something else. That is all. For a race of simple tastes, however, it is great fun.
>
> Chesterton GK, *The Napoleon of Notting Hill.*

Playing the prophet is a dangerous pastime. Lawyers and lawmakers in particular are often accused of a slow motion response to changes in commerce, rather than snappy anticipation and adjustment. For this reason the following brief list of prophecies is offered to assist those who are straining to see what is coming for lawyers, law students and clients in an era of electronic commerce.

Newspapers sometimes call digital prophets 'the digerati', which appears to be a combination of 'literati' and 'digital'.[1] I make no claim to membership of that class of high priest and my selection of topics is unapologetically random. Nevertheless, these suggestions are made seriously and with some hope of cheating those who would cheat the prophet.

Prophecy 1 - Australia will legislate with increasing frequency

The current rhetoric in favour of a 'light handed' approach to the Internet will change and Australian Parliaments will begin to follow other jurisdictions in a pattern of lengthy, complicated legislation in all areas of Internet law.

In a CNET Special Report, published in March this year, Susan Stellin canvassed her version of '10 Laws the Net Needs'.[2] Ms Stellin's list is reproduced in an Appendix to this piece to give an idea of what we might expect. The Australian list would not look too dissimilar, subject to the usual caveats about differences in underlying legal systems.

The recently proposed *Electronic Transactions Bill* 1999 (Cth) will lead the way.[3]

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* My thanks to Jan McDonald and William van Caenegem for comments on an earlier draft of this paper.

1 Literati are the learned class. Digital signals are a series of 1s and 0s, or, if you prefer, 'ons' and 'offs' that make up the signalling which permits the Internet to operate.

2 http://www.cnet.com/Content/Features/Dlife/Laws10/index.html accessed on 18 November, 1998.

3 See http://www.law.gov.au/ecommerce for details.

Prophecy 2 - Internet taxes will soon be mainstream

My contention here is that Internet taxes will appear, flourish and be avoided and evaded just like every other tax regime in history. Recent activity in the US Congress has seen the passing of the *Internet Tax Freedom Act*, ensuring a tax-free Internet for the next three years. Thereafter anything is possible and the future agenda will most likely be set by the OECD in combination with a special US Task Force due to report in early 2000.

Taxing the Internet will be on the international agenda for many years to come, spawning another round of voluminous reports and studies to solve the intricate nexus and jurisdictional problems which are arising in the wake of global electronic trade. In this regard, international treaties will begin to be implemented under the external affairs power of the Commonwealth Constitution to 'plug the tax holes of cyberspace'.

Prophecy 3 - Privacy laws will start slow and then grow

Australian privacy is already protected in various statutory nooks and crannies apart from the current centrepiece *Privacy Act* 1988 (Cth). Take, for example, the provisions of the *Data-Matching Program (Assistance and Tax) Act* 1990 (Cth), *the Telecommunications (Interception) Act* 1979 (Cth), the *Archives Act* 1983 (Cth), the *National Health Act* 1953 (Cth) and many more.

Thus far, the call for comprehensive privacy laws in the private sector has gone unheeded. An explanation for this apparent reticence may be found in the uncertain state of the world's two major economic powers on this issue. The US and the European Union (EU) seem to be still trying to work out a compromise over the EU Privacy Directive which came into force on 25 October 1998, and which mandates privacy protection for EU citizens as well as citizens of other countries which exchange data with the EU. Australian legislators appear to be sensibly awaiting the outcome of this tussle before embarking on their own course of privacy legislation. Victoria has not been so patient and has proposed privacy legislation in an attempt perhaps to steal an advantage over other jurisdictions.

My prediction is that comprehensive Australia-wide privacy laws will eventuate, but we cannot be sure at what rate or when.

Prophecy 4 – 'Net Native' business will be indistinguishable from Real World business

Here I would seek to draw on a taxonomy developed first (to my knowledge) by Paul Bambury in an article 'A Taxonomy of Internet Commerce'.[4] Bambury considers the future of I-commerce by 'attempt[ing] to clarify terminology discussing the interface

4 *First Monday* (f ¡ ® s T - m o ñ d @ ¥) Vol 3 No 10 - October 5th 1998. <http://www.firstmonday.dk/issues/issue3_10/bambury/index.html.>. *First Monday* describes itself as a 'peer reviewed journal on the Internet'. Published on the Web and CD-ROM, and designed to offer suggestions of more lasting impact, *First Monday* first appeared in May 1996 and has published 29 issues since that time. It is a kind of prophets' watering hole.

between commerce and the Internet.' Bambury's taxonomy has two main branches: (i) transplanted real-world business models and (ii) native Internet business models.

Looking ahead, I disagree with the idea that 'Native Internet business' will operate any differently from 'real-world' business and culture. My prediction is that the future roles of business, governments, regulation and ideology in E-Commerce development will be tied together in a far more seamless manner than is apparent at present. The law will also move in this direction as rules about the new technology find their way into Statute law, and more importantly, case law. A case in point where Judges are seen to be learning about and incorporating technology concepts would be the recent 'definition wars' over what constitutes an operating system in exchanges between University of Pennsylvania professor David Farber and US District Judge Thomas Jackson in the Microsoft anti-trust trial.[5]

The locomotive, the telex and the facsimile machine do not support specialist areas of law and the Internet is unlikely to do so either, although in the early stages there is an illusion of specialisation due to unfamiliarity with the technology.

Prophecy 5 – The concept of Jurisdiction will live on

Again, one of the true digerati provides me with inspiration on this topic. Esther Dyson is known for her computer industry newsletter *Release 1.0* and her book *Release 2.0*. Her recent elevation to Interim Chairman of the Internet Corporation for Assigned Names and Numbers (ICANN), which oversees the policies and technical protocols for the Internet, is perhaps a modern case of prophet becoming priest.

Dyson's talent is for stating the obvious. For example her idea of layered jurisdictions governing the Internet includes the following:

Layer 1:	physical space,
Layer 2:	Internet Service Providers (ISPs),
Layer 3:	domains and communities,
The other layer 3:	agencies.[6]

Dyson's description of Layer 2 governance as 'something real but messy that already works pretty well — the community of Internet service providers (ISPs)' is very helpful. They are indeed the primary 'property owners' of cyberspace and could be the means to control what does and does not pass through cyberspace. ISPs and telecommunications companies will be regulated much like the Post Office is now - subject to is own statute and case law. I do not foresee that ISPs will be used for control purposes at the micro-level of content and copyright law. However, they may be a handy control point for government when considering revenue flows (like the GST system will make use of businesses) or regulating the *public* display of undesirable content.

5 The Department of Justice together with a number of US States maintain that Microsoft has monopoly power in the market for personal computer operating systems.
6 Dyson, *Release 2.0*, Viking (1997), 107-109.

Prophecy 6 – Consumer law will adapt to new complications

In 1996 Don Tapscott wrote *The Digital Economy* and outlined his Twelve Themes of the New Economy: knowledge, digitisation, virtualisation, molecularisation, integration/Internetworking, disintermediation, convergence, innovation, prosumption, immediacy, globalisation, discordance. All prophets, it seems, enhance their credibility by using numbered lists and by inventing new terms.

Theme 9 – prosumption - takes advantage of that other prophetic tool, the New Word. By prosumption Tapscott means the blurring of consumer and producer, with each party playing a role in production, eg specially ordered vehicles manufactured using customer specifications delivered electronically. If this prediction becomes a reality then consumer transactions will become more complicated, a fact which will give rise to i) greater emphasis on the *caveat emptor* doctrine for complex purchases, and ii) greater legal protection for consumers when a more straightforward transaction goes awry.

Prophecy 7 – Law students of Generation-N will be technically savvy but still in need of guidance from senior lawyers.

Don Tapscott can also claim coinage of 'Generation-N' in his later book *Growing up Digital: The Rise of the Net Generation*.[7] As this generation finds its way into law school the structure of teaching as well as content will obviously change. Copyright, Trade Marks and Patents will still be taught, but with the Internet in mind. The demise of the celebrated 'Cyberlaw' and 'Law of Electronic Commerce' subjects, now popular in US Law Schools, will also come, but this may take some time in Australia as they have yet to inflame the hearts of Deans, faculty members and the all-powerful Academic Senates.

Importantly, those lawyers of Generation X or older will still play an important role in passing on the culture of law. We may sound like non-native speakers when it comes to discussing 'Java' or 'interlaced GIFs', but the kids still look to their elders for advice and guidance.

Prophecy 8 – The Internet is not the end of Real Life or Real Law

Good prophets are, from time to time, required to do some tearing down as well as building up. This seems good enough reason to play the modern Job. In his 1995 book *War of the Worlds*, Mark Slouka described cyberspace as the Road to Unreality, rather than the Information Superhighway. For him, virtual reality assaulted our sense of identity, place, community and reality and was leading us rapidly away from that which makes us truly human. His main contention was that 'the world provides context, and without context, ethical behaviour is impossible.'[8]

Context and law are old friends, with the former guiding the latter through periods of rapid change. Slouka's assertion that the Internet can deprive us of context is to be

7 *Growing Up Digital: The Rise of the Net Generation* McGraw-Hill, New York, (1997).
8 Slouka M, *War of the Worlds*, Basic Books (1995) 13.

taken seriously, but I think only until cyberspace becomes part of normal space. Like any new toy, humans have a tendency to over-indulge and it is good to be reminded that ‘reality is not such a bad place after all’.

Conclusion

Lawyers are not typically gifted with second sight. The above survey may aid those lawyers who are looking ahead to the types of problems which Internet globalisation will soon present. Even if all prophecies are wrong and the prophet finally cheated of a reward, I suspect lawyers who’ve read this will still be able to search out some avenue of compensation. Cyberlawyers – coming soon to a future near you!

Appendix

Susan Stellin's Top 10 laws the Net Needs:

1. **Put Porn in its Place**. All Web sites devoted to the sale or dissemination of sexually explicit content should live in a newly created top-level domain, for example, a .xxx domain.
2. **Ban Spam**. Sending unsolicited advertising via email should be prohibited, unless the sender has a pre-existing relationship with the recipient or their consent to receive messages.
3. **Protect the Freedom to Link**. Any Web site should be able to link to any other address on the Web, without asking for permission or seeking a license.
4. **Mandate Privacy Policies**. Any Web publisher that collects personal information from its visitors should have to post a policy stating what data is gathered, how it is used, and whether it will be shared with another party.
5. **Stop Domain Speculators**. No owner of a Web address should be allowed to sell or give that address to another party, unless it's transferred as part of the sale of a business
6. **Unmask Mystery Webmasters**. All Web sites should have to identify who is responsible for publishing information on the site and provide a way to contact them.
7. **Protect Personal Information**. Online services and Web publishers should be prohibited from publishing personal information online – like home addresses, phone numbers, email addresses, or Social Security numbers – unless they obtain permission or get the data from another source that has been authorised to release it online.
8. **Close Libel Loopholes**. ISPs shouldn't be liable for content they merely transmit – for example, email, chat, or newsgroup messages – or the content of subscribers' Web pages. But they should be responsible for content they pay for and publish.
9. **No New Taxes**. New taxes that specifically target the Internet or electronic commerce should wait until online tax jurisdictions are settled.
10. **Build a UN Net.** There should be and international governing body for the Internet – that is, a UN Net – whose members are empowered to implement Internet policies in their countries.