

## AUSTRALIA



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<b>1. Case Report:</b>	Grosse v Purvis [2003] QDC 151
<b>Topic:</b>	Recognition of the tort of privacy for individuals
<b>Where:</b>	Queensland District Court
<b>When:</b>	Decided in 2003
<b>What happened:</b>	<p>A recent decision of the Queensland District court in <i>Grosse v Purvis</i> [2003] QDC 151 has found for the first time in Australia that an individual can bring an action based on the tort of invasion of privacy. The Queensland District court is a court with jurisdiction in the state of Queensland, which is one of the States of Australia.</p> <p>Legislation at State and Federal level provides regulation for the public and private sectors on the obligations of organisations in relation to the collection, handling and disclosure of personal information of individuals. However, the legislative regime is restricted to information privacy. Now that a common law action has been upheld for the tort of invasion of privacy for such things as intruding and "stalking", the privacy rights of individuals have been extended beyond information privacy.</p> <p>Although the principle that there was no general common law right to privacy had been established in Australia for many years, comments by the High Court of Australia in the case of <i>Australian Broadcasting Corporation v Lenah Game Meats</i> in 2001 left the door ajar to an action for invasion of privacy. The Queensland District Court opened the door further so that the tort of invasion of privacy is now established legal principle in Queensland. Whilst the case is not binding in other Australian States and Territories, it will have a persuasive effect in States and Territories outside Queensland.</p> <p>An appeal against the decision of the District Court has been lodged, so the Queensland Court of Appeal may have the opportunity to rule on this issue if the appeal proceeds.</p> <p><b>The tort of invasion of privacy</b></p> <p>Senior Judge Tony Skoien of the Queensland District Court in <i>Grosse v Purvis</i> set out his view of the essential elements to establish the cause of action for invasion of privacy of an individual as follows:</p> <ul style="list-style-type: none"><li>• a willed act by the defendant;</li><li>• which intrudes upon the privacy or seclusion of the plaintiff;</li><li>• in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;</li><li>• and which causes the plaintiff detriment in the form of mental, psychological harm or distress or which prevents or hinders the plaintiff</li></ul>

	from doing an act which she is lawfully entitled to do.
<b>Comment:</b>	<p>Apart from actions against individuals for invasions of privacy, this decision could impact on any business where the business could be vicariously liable for the actions of its employees.</p> <p>Media reporters, journalists, photographers, marketers, private investigators and businesses engaging them may need to review their practices and activities to ensure that their conduct does not result in the invasion of an individual's privacy. Prudent practices should be adopted to ensure that behaviour towards and contact with individuals does not intrude into that individual's privacy or seclusion and result in physical, psychological and emotional harm or hinder the legitimate acts of the individual.</p>

<b>2. Case Report:</b>	Kabushiki Kaisha Sony Computer Entertainment v Stevens ("The Sony Playstation mod-chipping case")
<b>Topic:</b>	'Mod-Chipping", circumvention devices
<b>Legislation:</b>	Copyright Act 1968 (Cth)
<b>Where:</b>	Full Court of the Federal Court of Australia
<b>When:</b>	30 July 2003
<b>What happened:</b>	<p>This case is one of the first to interpret the anti-circumvention provisions of the Digital Agenda Act 2000 modifying Australia's Copyright Act, and which was intended to satisfy Australia's obligations under the WIPO Copyright Treaty (akin to the Digital Millennium Copyright Act 1998 of the USA).</p> <p>Sony Playstation used a chip on each console and an access code trace on each CD game to prevent the use of unauthorised copies of games. This security system also technologically enforced Sony's regional coding of consoles and games software.</p> <p>A local Australian Playstation/games retailer (Stevens) sold and installed "mod-chips" for consoles, which then allowed customers to play games coded for other regions and to play unauthorised copies of games on their consoles.</p> <p>Sony sued Stevens for trade mark infringement, misleading or deceptive conduct and for liability under section 116A of the Copyright Act, claiming that the supply and installation of a mod-chip constituted a circumvention device capable of circumventing "technological protection measures" in the consoles.</p> <p>The judge at first instance held that the protection measures did not constitute a "technological protection measure" and thus Stevens' mod-chips were not infringing circumvention devices.</p> <p>The Full Federal Court held, conversely, that Sony's console/games CD's protection was a "technological protection measure" and thus the retailing and installation of mod-chips did constitute a circumvention device capable of circumventing a technological protection measure and thus breached s.116A of the Copyright Act.</p>

<b>Comment:</b>	<p>Implications:</p> <ul style="list-style-type: none"> <li>• may now extend to DVDs – resellers who have modified DVD players to play DVDs manufactured in any of the 8 international regions may now find themselves infringing s116A too.</li> <li>• The ACCC has disapproved of this decision, remarking that consumers will now suffer a loss of choice and pay more for their games.</li> </ul>
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<b>3. Case Report:</b>	Telstra Corporation Limited v Royal & Sun Alliance Insurance Australia Limited [2003] FCA 786 "The Goggomobile Case"
<b>Topic:</b>	Advertising, passing-off, secondary or suggestive brand advertising
<b>Legislation:</b>	Trade Practices Act 1974 (Cth) ss.52, 53(c) and 53(d) Copyright Act 1968 (Cth) ss.10, 14 and 31(1)
<b>Where:</b>	Full Federal Court of Australia
<b>When:</b>	1 August 2003
<b>What happened:</b>	<p>The owner of rights to the Australian Yellow Pages ran a series of very well-known and successful TVCs in the 1990's for Yellow Pages, which featured a male character who came to be known as "Mr Goggomobile". He spoke in a thick Scottish brogue and was a restorer of the quaint and rare Goggomobile car. The TVCs showed him trying to locate parts for his Goggomobile and becoming frustrated when car parts dealers hadn't heard of it or confused the model. The TVCs featured him spelling the name in his distinctive voice. "Goggomobile...that's G-O...G-G-O..."</p> <p>Finally, through his diligent use of the Yellow Pages, he finds a car parts dealer that has heard of the car and can help him with the spare part he needs much to the relief and joy of Mr Goggomobile.</p> <p>A few years after that campaign, the advertising agency for Shannons, an automotive insurer specialising in insuring rare, vintage or otherwise expensive vehicles, decided to embark on a campaign featuring Mr Goggomobile seeking to insure his beloved Goggomobile and not having much luck with other insurers, until he happens across Shannons, who are "on his wavelength". The TVCs feature the same actor playing Mr Goggomobile with the same heavy Scottish brogue and featured other identifiable elements from the Telstra Mr Goggomobile TVCs such as Mr Goggomobile having to spell the name of the car.</p> <p>Shannons' agency had approached Telstra seeking their consent to the use of the Mr Goggomobile character. Telstra refused, as they claimed to have had an unfavourable outcome to granting consent previously to another advertiser.</p> <p>Shannons went ahead with the TVCs, claiming they tried to make them as unlike the Yellow Pages TVCs as possible.</p> <p>Telstra sued for copyright infringement in their script and also for misrepresentations and misleading and deceptive conduct in trade or commerce in breach of the Trade Practices Act, as well as the tort of passing-off.</p>

	<p>The Full Court held that there was no copyright infringement in the script, but that the Shannons TVC did pass off on the reputation built up in the earlier Yellow Pages TVCs and also that the Shannons TVCs suggested a false association, endorsement by, or other connection with, Yellow Pages. The Court considered that consumers would quite likely think that Yellow Pages (Telstra) had given permission to one of their customers (Shannons) to use their Mr Goggomobile concept in the customer's own advertisement. Shannons was permanently enjoined from further broadcasting the TVCs or any TVC "substantially similar or a colourable imitation" and was ordered to pay damages (quantum to be determined at mediation, or otherwise to be subsequently determined by the Court).</p>
<b>Comment:</b>	<p>The defendant (Shannons) raised several defences, one of which was parody. The issue of parody was unfortunately not considered in any detail in the Court's judgment; which is a shame as it is an area in which some judicial comment and guidance would be useful, given that parody has become a popular marketing technique.</p>

<b>4. Topic:</b>	Transfers (Change of Registrar of Record) Policy
<b>Who:</b>	auDA - .au Domain Administration
<b>When:</b>	16 June 2003
<b>What happened:</b>	<p>The new transfer policy is intended to promote competition within Australia as:</p> <ul style="list-style-type: none"> <li>• registrants will be able to make an informed choice when choosing a domain name registrar; and</li> <li>• domain names can be easily and quickly transferred.</li> </ul> <p>All requests for domain name transfers are to be made in writing by either email, facsimile or letter, and should include the domain name password. Validly requested domain name transfers will be effected within 2 days of notification.</p> <p>In order to ensure that it meets its stated objectives, auDA will hold a public review of the new policy 6 months after implementation.</p>
<b>Comment:</b>	<p>The new policy will allow registrants to transfer their domain names at any time during the domain name license period without any loss of the remaining license period.</p> <p>The new policy also prohibits registrars from which the domain name is being transferred to delay or prevent the transfer. Further, it prohibits a fee in respect of the transfer being levied by either the outgoing or incoming registrar.</p>

<b>5. Case Report:</b>	National Office for the Information Economy v Verisign Australia Limited LEADR Case No. 02/2003
<b>Topic:</b>	Panelist recommends an alternative remedy in a dispute under the auDRP
<b>Who:</b>	LEADR, Sole Panelist, Philip N Argy
<b>When:</b>	26 June 2003

<p><b>What happened:</b></p>	<p>In 1998, the National Office for the Information Economy (NOIE) launched the government's Gatekeeper strategy. Gatekeeper is an accreditation scheme for providers of Internet infrastructure technology. It is intended to secure online transactions between government agencies through a digital certificate system.</p> <p>NOIE applied for the trade mark GATEKEEPER as a certification mark in June 2000, following which NOIE began to accredit both governmental and commercial internet service providers. NOIE registered the domain name "gatekeeper.gov.au" in February 2000.</p> <p>In order to achieve full accreditation, it is necessary to pass NOIE's strict authentication framework. Verisign was granted entry level accreditation on 5 April 2000 and full accreditation in April 2001.</p> <p>From 9 April 2000, Verisign (then eSign Australia Limited) began advertising its Gatekeeper accredited services through its website <a href="http://gatekeeper.esign.com.au">http://gatekeeper.esign.com.au</a>. Verisign subsequently registered the domain name "gatekeeper.com.au" on 20 September 2002.</p> <p>NOIE brought a complaint against Verisign under the .au Dispute Resolution Policy (<b>auDRP</b>).</p> <p>It was found that the disputed domain name was identical to NOIE's trade mark and that Verisign had no rights or legitimate interest in "gatekeeper.com.au". Further, by registering this domain name it was likely that Internet users would be redirected to Verisign's website, which could cause Internet users to think that Verisign was the sole supplier of digital certificates under NOIE's Gatekeeper programme.</p> <p>Philip Argy concluded that:</p> <ul style="list-style-type: none"> <li>• Verisign had intentionally attempted to attract Internet users for commercial gain;</li> <li>• the domain name had been registered and used in bad faith; and</li> <li>• the domain name should be transferred to NOIE.</li> </ul> <p>However, it was possible that due to NOIE's status as a government entity, such a transfer would not be possible (as NOIE could be considered to be ineligible to hold a ".com.au" domain name).</p> <p>Therefore, an alternative solution was recommended by Philip Argy that the disputed domain name be cancelled and the term "Gatekeeper" added to auDA's reserved list of words.</p> <p>This alternative remedy would prevent any other party from applying for a domain name containing the word "gatekeeper" without NOIE's prior consent.</p>
<p><b>Comment:</b></p>	<p>It is arguable that a panellist can order the cancellation of a domain name where no such request has been made by the complainant, and whether this alternative remedy can be proposed at all.</p> <p>If the term "Gatekeeper" is placed on auDA's reserved list, it would</p>

	effectively create a quasi-monopoly in the word "Gatekeeper" within the .au domain space. Should auDA confirm this suggested remedy, it would prevent bona fide registrants from using the word "Gatekeeper" in a domain name even if they would otherwise be entitled to such registration.
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<b>6. Case Report:</b>	Universal Music & Ors v Hendy Petroleum & Ors [2003] FMCA 373 (5 September 2003)
<b>Topic:</b>	Copyright in CDs
<b>Where:</b>	Federal Magistrates Court of Australia
<b>When:</b>	Decided in 2003
<b>What happened:</b>	<p>The case concerned the alleged sale of illegal music CDs containing song compilations. In this case the second respondent purchased 10 CDs for \$200.00 cash in a bar in Darlinghurst, Sydney and subsequently sold them in his service station and convenience store (the first respondent) which regularly stocked CD's for \$25.00 each.</p> <p>The second respondent's evidence suggested that CDs were purchased for his son. However, it was later suggested in his evidence that the CDs were also for his step sons and his son's friends. It was claimed that the respondents were innocent infringers. In particular the second respondent stated that "as the fellow was openly offering the CD's for sale in a public place I assumed there was nothing illegitimate about the CDs"</p> <p>There was no question as to whether copyright existed in the CDs and the case primarily concerned the infringement of the copyright by the respondents.</p> <p>It was found that the purchase of the CDs was not an innocent one based on a number of factors such as:</p> <ul style="list-style-type: none"> <li>• providing the court with different evidence as to how and where the CDs were purchased,</li> <li>• that the second respondent purchased ten CDs but only of three types;</li> <li>• the second respondent's evidence to the fact that he had enough experience of people selling him 'suspicious' items to know the difference between a legitimate item and not; and</li> <li>• that the second respondent would know that people do not sell legitimate CDs in bars out of duffle bags and that legitimate sellers give receipts and attend upon one's premises to effect a sale.</li> </ul> <p>In considering the damages to be awarded to the applicants, the court noted the inclusion of subsections 115(4)(b)(i)(ia) and (ib) of the <i>Copyright Act 1968 (Cth)</i> effective from May 2003, which states that the court can have regard to:</p> <p><i>"(ia) the need to deter similar infringement; and</i>  <i>(ib) the conduct of the defendant after the act constituting the infringement or; if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright;..."</i></p>

	<p>While it was found that the consideration of (ib) did not hold much weight, it was found that the deterrent factor was one that should be given considerable weight. However, although it was found that the respondents knew that the CDs they were selling were not legitimate, it was <u>not</u> found that there were many copies of the CDs, or that the respondents were burning themselves new copies, or that the CDs were just the “tip of iceberg”.</p> <p>As such, the respondents' conduct was found to fall towards the lower end of the range of flagrancy and damages were awarded to applicants in the amount of \$17,500.00.</p>
<b>Comment:</b>	<p>This is another case of the worldwide clamp-down on illegal copying of CDs and an indication of the extent to which the larger record companies are prepared to go to deter entities from engaging in illegal copying or selling illegal copies.</p>