

"Law Shaping Technology; Technology Shaping the Law" – Bileta 2008 Keynote Lecture

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Good morning ladies and gentlemen. It gives me great pleasure to have the honour of presenting one of the Keynote introductions at this year's Bileta conference. The subject of this year's conference is described as "*Security and privacy of our personal information is becoming a central theme with the rise in social networking technologies and user generated content. Have sites such as Facebook and YouTube responded in a timely and effective manner to safeguard our data, whilst promoting our rights to free speech*".

Over the last twelve months it is clear that data protection has reached a new level in the psyche of the individual citizen and that, increasingly, the public are turning to lawyers seeking redress from some actual or perceived breach of their rights and of their privacy; nor, however, is this a purely British problem. Obviously from a legal perspective much of the pressure for data protection has been driven by European Community Directives, they in turn being a necessary implementation of a Council of Europe recommendation on privacy. Having had the opportunity over the last few years to conduct a project for a client looking at implementation of the Data Protection Directive over 16 of the Member States, and having had for interest and general information needed to consider the rules in many of the others, the only thing that can be said is that it is possible for 25+ countries to take a single text and turn it into national law in 25+ different ways; indeed, other than the Data Protection principles with which you will all be familiar, the national systems have little in common. For a business person there would seem to be irrefutable logic in trying to implement these types of regimes in a more consistent and coherent system. I'm far from convinced that the system I would choose would be the UK one, and equally I doubt that our business community would thank us for the German system, although Germans seem to find that wholly acceptable to them.

As someone who travels a great deal on business according to my family and colleagues (and who occasionally is out of the office according to me!), it has been a very fascinating exercise to watch how public and political perception to data protection and privacy has shifted in the last ten years.

Although the original Data Protection Act in the UK was 1984, it was really only with the 1998 Act that data protection ever raised a murmur in the public consciousness. Outwith Europe, data protection and privacy as we understand it was confined to some of the commonwealth and, in a very specific regard to celebrities in California who needed protected from the very people who had made them celebrities in the first place. I can recall some seven years ago having the pleasure of chairing a conference in Adelaide on data protection where the then Australian Privacy Commissioner, Malcolm Crompton gave a keynote speech which had a number of buzz phrases which in the years since I have shamelessly recycled – albeit usually with attribution – and I make no apology for doing so again this morning as I believe that these simple concepts underpin or should underpin everything that we strive to achieve in this important area.

My Privacy ... My Choice
Privacy is about our "right to be let alone" Louis Brandeis
Respecting Privacy

This may appear overly simplistic but as lawyers are accused of making things overly complicated – actually lawyers crave simplicity and clarity despite what some clients may erroneously believe; unfortunately the quality of legislation over the past quarter century has declined as with general educational standards to a level that it is often almost impossible for the trained legal mind, let alone the man on the proverbial Clapham omnibus, to comprehend what the legislator intended let alone how it should be applied. However, I digress.

These three simple concepts may seem uncontroversial to you and perhaps in a democracy they should raise few eyebrows; however, let's step back for a moment and look at the reality of the world in which we live. Very quickly we see that anonymity and privacy are fast becoming a luxury or at least something which we cannot take for granted. Probably one of the most famous cartoons ever is a cartoon from the New Yorker which has a dog at a computer keyboard and the caption reads "On the internet no one knows you're a dog". Whilst that is true to some extent, the fact that one were a dog might be readily ascertainable by a search of the IP address from which the messages emanated, a subpoena to the ISP for the traffic records and a match between user details and that IP address, thereby showing that the computer was connected to the dog pound or a kennel!

Protecting privacy is about protecting our sense of self:

- who we are
- what we know
- what we think
- what we have done
- what we want to do

Orwell in 1984 described a society in which "Big Brother" watched everything that the individuals did or thought. In 2008, the position is reversed and

individuals watch everything that contestants on Big Brother do – although I have to say that watching people fast asleep for hours at a time is far from my idea of entertainment.

I can remember in the sixties and seventies, reading 1984 and thinking that it was something so far in the future as to be irrelevant along with such other classics as 2001 - A Space Odyssey and Space 1999; and, perhaps I was right – however, the fact is that if Orwell wrote his sequel and called it 2020 would any of you see it as fiction or as a technical guide? Our perceptions of privacy and expectations of personal privacy have been radically changed by the events of the last two decades; the present debate about ID cards seems emotive to those of us in the UK but in much of the rest of the world it hasn't been an issue for over half a century. Of course one cannot expect the Briton (and I suspect more the Englishman than the Scot) to have to carry an Identity Card; that is of course unless you have in mind travelling by plane. If you don't have a passport or a photo driving licence, travelling by Easyjet to Barcelona is as possible as building a set of wings and flying, Icarus-like, to the sun.

So we need to look more deeply at this question. Clearly we don't mind carrying identity cards of some description for some purposes. My colleague Val Surgenor will be presenting a paper later today on RFID tags and privacy – those of you who travel in London will have seen, and may possess, an Oyster Card. That is an ID card of sorts and it knows where you are; M6Toll and DartTag are both ID type cards in that the system knows where the tag is. Millions of citizens are prepared to sacrifice some of their privacy for the extra convenience (or in the case of Oyster, substantial saving) that these systems bring. Back to Malcolm Crompton's first principle – My Privacy... My Choice. I don't have to carry an Oyster Card; I don't have to cover my car in Toll tags, I may choose to do so but I cannot be compelled so to do. It is that fundamental difference which underpins much of the rational opposition to ID cards and the like.

The argument that it will in some way make us safer is perhaps a convenient argument for a system bereft of real value; indeed, if the system were of great value, most people would want to have one. If I suggested that my carrying the new card I have invented "the BiletaCard" you would automatically be allowed to travel free on airlines first class and pay a maximum tax rate of 2% I would be killed in the stampede for the sign up. Therefore it must be that the populous has still to be convinced firstly that the card will be of value and secondly that the information that it will contain or provide the access key for will be kept safe by those who will collect it.

That's brings me to the next part of this address, the rise of social networking and user content and the privacy and security issues which this raises.

Personally, I have never seen the attraction in FaceBook, Bebo, YouTube and the like but perhaps that is a generational thing. However, the fact is that for millions of young (and not so young people) these are major parts of their lives;

indeed in a culture which sociologists might describe as having a lack of one-to-one face-to-face human resource interfacing many people conduct their entire lives through the filter of a social networking environment, arranging their social calendar, lives and loves in the ephemeral world of cyberspace. Those of you who know me will be aware that I am a shy, retiring sort of person – or at least a private person (to some extent). I believe strongly in privacy and private information – not because I have anything to hide (or nothing more than anyone else) but rather because it is none of your business. I therefore have a conceptual difficulty in coming to terms with the information which is imparted on the social networking sites by the individuals themselves.

I know that the conference has questioned what sites such as Facebook are doing to protect our data and our privacy? However, I question (as I am allowed to do in a keynote) whether Facebook has any obligation to protect us from ourselves. If I choose to have a Facebook page on which I publish my name, address, bank details, PIN, mother's maiden name and the like, should Facebook have any responsibility to protect the integrity of that information from abuse. Perhaps more relevant might be the ease, or rather lack of ease, with which one can withdraw from social networking sites and expunge all information about one.

Facebook has recently come in for criticism for retaining information even after someone closes their account; some information may still be accessible and much will never disappear. At least, however, the information was originally mine and I must, at some time, have wanted it to appear. YouTube type sites are somewhat different in that much of the information posted does not relate to the poster but to others and how is their privacy to be protected?

It may seem to have been a good idea to upload a video of your student colleague in an inebriated state behaving in an anti-social way; he / she may even have found it amusing ... at the time. Unfortunately, in 5 years time when the reality dawns that one cannot be a student for ever and that gainful employment must be sought, will that video enhance one's attractiveness to a potential employer. And have no doubt about it, employers are routinely carrying out online searches using Google / YouTube / FaceBook / Bebo etc to get a real idea of a candidate and a video of you being sick over a cat is not generally perceived as being a plus point.

This brings us to one of the dichotomy of today's conference; how can the right to free speech be reconciled with the right to privacy. The issue is that, in our western democracies, each of these is given an equal importance – albeit that there may not be any specific right of privacy in UK law. I am delighted to say that the question of the existence or otherwise of a right to privacy in UK law is a subject for another day, or at least another time. It is however curious that many of the individuals who seem desperate to establish and protect their right to privacy are the very same individuals who have based their celebrity status on self promotion and for whom the requirement for privacy is more to protect the perceived value of the "exclusive" they have signed with a "Celebrity"

magazine than any real desire to adopt a Mae West posture of “I want to be alone”. Consider a politician who takes all steps including injunction to prevent newspapers printing pictures of his children in order to protect their privacy, yet sends out thousands of Christmas cards showing those children – is that privacy, or hypocrisy?

Maybe social networking sites have no obligation to protect our data – at least insofar as we have chosen to make it publicly available on those sites. I understand from those younger than I, that it is possible to make one’s page hidden from all but those to whom one has chosen to grant access. On the other hand, I know of individuals who cannot add more friends as they have reached the limit for friends on Facebook (10,000 I believe). Luckily, as a lawyer, having more than 10,000 friends is unlikely to be a problem any time soon. Are these people friends – I’m not sure how I would describe them. Perhaps it is part of the desire to belong and to be wanted that spawns this reciprocal sycophancy.

Possibly it is all part of a greater social phenomenon of self publicity; in a world in which for many career aspirations include winning the lottery and appearing on Big Brother, and where everyone is told that they can achieve everything, individuals have the mistaken belief that others have any interest in them, what they say or do or what they think. According to a quote in Blog Herald¹, “Technorati currently states it is tracking over 112.8 million blogs, a number which obviously does not include all the 72.82 million Chinese blogs as counted by The China Internet Network Information Center.” I don’t wish to be unkind but I doubt that many of these 185 million people are saying anything to which I would wish to listen; indeed, looking at many blogs shows that the only people reading them are the authors.

Turning back to the wonderful New Yorker cartoons sees February 2008’s calendar entry with two dogs, one of whom is saying to the other “I used to have a blog, but now I’ve gone back to pointless incessant barking”.

Should law and society protect such blogs as free speech or protect those mentioned therein from having their information and exploits retained in perpetuity? In the pre-internet age (as can be seen from the old films shown on cable and satellite) it used to be that the cub reporter was sent to the dusty archives for the local newspaper to see if they could find information about someone – generally a well known person, good or bad – and come back to the office clutching a copy of some dusty clipping. Today the reporter would probably never leave his desk; everything that has been said or written about anyone in any public media in the last 20 years is almost certainly on-line. Yesterday’s newspaper used to have a limited value as a wrapper for fish suppers; if I didn’t see a story in a newspaper because I was away, the chance of ever seeing it was almost nil. Today, I come back to my desk (assuming that I wasn’t reading the paper online on the beach somewhere) and after a few

¹ <http://www.blogherald.com/2008/02/11/how-many-blogs-are-there-is-someone-still-counting/>

keystrokes I have everything I need to know in front of me. Bileta 2008, itself, returns 153 entries from around the world.

This year's conference is very timely; the four tracks which you have chosen to address are all topical and complex issues for many of which there are as yet few issues. I have focussed in this keynote on some of the data protection and privacy issues which appear to me to merit consideration. A similar focus could have been made on any of the other streams, all of which interact and cross-over; indeed looking at the many papers which are being presented over the next two days, there are many which could have fitted in more than one stream.

The second stream that you are to consider is that of Copyright, although many of the papers there would fit equally into a Technology stream.

Of all the IP rights with which we have to deal, Copyright is perhaps both the best known and the most contentious. I don't have to remind an academic audience of the issues of file-sharing in an academic environment although I know that this University has a robust Information Transfer Policy which prohibits P2P sharing and trafficking in copyright material.

Clearly none of us (and of you) would want to break the law; but many today do not see P2P filesharing as infringing; there is little recognition of a connection between creativity and copyright infringement; perhaps this is because most of the infringement action worldwide has been taken by the behemoths of the music industry with little apparent benefit for the musicians.

Copyright within an academic environment is almost a *sine qua non* given that academia is supposed to be a hotbed of creativity. On the other hand, Universities are supposed to be about information dissemination and exchange of ideas. Particularly in the UK (but also over much of Europe) the role of the academic in information exchange seems to be lost. The ideas which exist in the US of "fair use", alas seem to have no place in UK law and, indeed, recent changes in the law have made the limited fair use exceptions even narrower. This matters to you as academics as you must be able to refer to or incorporate (under attribution obviously) other work in your theses and papers.

Copyright is supposed to be a compact between creators and society as a whole; in return for making one's brilliance available to society, society gives the creator a limited period of monopoly in respect thereof.

The problem is that as copyright has become longer and longer (allegedly to prevent Mickey Mouse ever becoming public domain) this compact has been irreversibly slanted in favour of the content industry (as opposed to the creator); work is now protected for longer than the true economic life of the material. However, whether it is life +50, +70 or something else – the US has the longest potential period of 120 years – at least if one can live long enough, a work will become public domain at some point.

Step in technology in the form of DRM; most national copyright laws prohibit the removal or circumvention of any DRM control device or technology. This has a number of serious consequences for you and other users of copyright material. Firstly, after the copyright period, you still won't be able to have unfettered access to material as it will still be DRM'd and if experience is anything to go by there will be no way of reading it; think Betamax, 8-Track and more recently HD-DVD; secondly, DRM and other similar measures are simple and unselective – these have no knowledge or understanding of such fair use rights as you might have. I know that you will be talking about Creative Commons this afternoon and perhaps this is a way forward.

Nevertheless one must query whether the existing law (and the proposals to "improve" it being touted by the content industry) meet or continue to meet the requirements of the creator/society compact ... or whether major change is needed. If the purpose of legal protection is to encourage creators, how does a music industry company such as Sony or Universal owning all the copyrights facilitate this purpose?

The government and the EU Commission have both been consulting on this matter recently and will no doubt do so again. We put in comments – did you? If not, perhaps you should; have no doubt, the content lobby will be putting in its arguments that, absent more draconian rules, it will be the end of civilization as we know it – if you don't agree, Do something about it!

You will be pleased to know that I don't intend to deconstruct the other streams in the same way as I have done with privacy and copyright but, as an academic audience, there are clearly matters which I would hope you would address. Unfortunately for many of these issues there is no real debate and the agenda is being driven by very powerful vested interests which conflict with academic and individual interests and with the interests of society as a whole. In closing I leave you with some thoughts and a few questions for you to ponder over the next two days: -

- How should the monopoly rights of content owners be reconciled with the rights of users?
- Is DRM compatible with permitted use under copyright law?
- What ever happened to fair use?
- If breach of data protection law should be punishable by financial penalty, how should breach in the public sector be handled, given that any penalty would simply be recycled?
- Should ISP's require to police IP rights – and if so how does this fit with privacy concerns?
- How in a global world do we reconcile different social norms and standards where a single internet page can be seen anywhere? Are we confined to the lowest most conservative standard?
- How do we / can we ever recover trust in government to look after our data?

Thank you for your attention, I wish you a successful and stimulating 2 days.