

THERE'S AN APP FOR THAT

HAMISH FRASER

Partner, Truman Hoyle Lawyers

This paper explores the evolution and landscape of the App, what governs and regulates the App and the App market now, what might be missing and explore some possible future outcomes and thoughts for the current convergence review. It considers the question — Is the App the first truly converged ‘device’?

The role of the App

To explore the importance and dominance of the App, it is both useful and necessary to have a look around at just some of the Apps and the dimension of the App and the App market. This paper cannot hope to traverse all aspects of the market but rather explores some of the Apps available by reference to some of the regulatory or legal issues they blur or challenge.

Since Apple launched the first iPhone in 2007 and the App Store in June 2008, the App has become ubiquitous and all conquering across a variety of platforms. Apple's App Store alone has amazing statistics:

- 1 Billion downloads in under 1 year;
- 10 Billion in a little over 2.5 years;
- There are now over 500,000 Apps available through it.

More broadly the market for Apps has grown well beyond Apple:

- Current App economy (all platforms) is estimated at \$7Bpa;
- Projections see it rising to \$30B by 2015;
- Approximately 60% of smart phone users download an App a month; and
- They each spend approximately \$4.00 each a month doing so.

Apps are available on any and every device, from any of the range of smartphones, to tablets and increasingly on PCs and TV screens.

Apps are now available from a variety of stores:

- Operating System stores: Apple, Microsoft, Android (Google) and BlackBerry;
- Carriers: Optus, Telstra and Vodafone, but also overseas players like AT&T;
- Brands: Amazon, Adobe and Ericsson; and
- Independent Platforms: GetJar, Appilatism and Handango.

And the developers of Apps range enormously. From users to the classic game makers, from the movie studios to the major news outlets, Facebook, Twitter and the corporate world, all of them are creating Apps, and its not always easy for the end user to distinguish (or care about) which is which.

What is perhaps more surprising is that the App did it without anyone seeing it coming or predicting its rise (and rise).

App examples

The App is now many things to many people, to many smart phone owners it's an entertaining game to play while stuck in a queue or in the back seat of the family car, to others it's a way of booking

and checking in on flights or buying on eBay. To businesses and marketers, aside from being something of an unknown, it can be a very effective way to engage with your customers.

For developers an App a potential goldmine: Angry Birds (discussed in some detail below) is arguably the most successful game in Appland.

While some businesses are slowly adopting the online advertising market and adwords, the concept of micro ads is allowing 'free' Apps to make considerable sums of money.

The App has also brought into reality something that has been touted for a while as the next big thing — micropayments.

Below is a list of some types of Apps covering a wide variety of multimedia types and a short summary of their function:

1. TV apps, (e.g. ABC iView), allow not only catch up TV but TV guides and extras. It is the writer's suggestion that real time (linear) TV is not available in an App due to bandwidth and/or existing regulatory restraints;
2. International TV — BBC iPlayer, the same as local catch up TV but now direct from overseas;
3. Online video recorders (PVRs) such as Optus TV allows people to record free to air TV and watch it on any screen;
4. Radio stations — many Radio Apps allow live streaming of the linear broadcast. There are also Apps that aggregate radio stations from around the globe)
5. Newspapers offering print, video and a variety of multimedia (e.g. *SMH*);
6. Services to order a taxi or a pizza based on your phone knowing where you are;
7. Online payment systems such as paypal and ebay;
8. Games and humour (from Angry Birds to bubble popping);
9. Adult content; and
10. Phone tracking Apps to follow and map the movements of others in real time.

The success of Angry Birds is worth reflecting on, to consider how a single and relatively inexpensive App can turn (at least part of) the world upside down.

In 2009, Rovio, the makers of Angry Birds are rumoured to have been borderline insolvent. It created the game Angry Birds for about \$140k with 4 people over 8 months. It was released on 10 December 2009 (less than 2 years before this paper was written). Consider then:

- On 2 November 2011, there had been 500M downloads;
- When released on Android, 1M downloads occurred in the first 24 hours;
- It is the best selling App of all time and has been (or still is) the number 1 App in 68 countries;
- It is played by the British PM David Cameron, Salman Rushdie and Justin Bieber;
- On Apple it's a paid App, in Android its free with advertising — both channels are said to be making \$1M a month;
- There is now an Angry Birds film, T shirts and soft toys (one soft toy being launched into space in early November); and
- IPO rumours of \$1B in 2012.

Regulation and governance

What governs or regulates Apps?

There are many legal and regulatory issues that an App creates. As noted it is not the purpose of this paper to cover the regulatory issues, but rather posit that in a very short time frame we have begun

to see true convergence and that the App provides a useful lens through which to try and determine how to legislate and regulate in a converged world.

Some questions that arise are:

- Curating App Stores: Who is responsible for the App? What if the App has a problem (or is a breach of copyright?). If the owner of the store establishes a ‘walled garden’, does the App Store owner curate the store and take on some responsibility? Is there a safe harbor?
- Copyright infringement is already rife on the internet, apps make it worse — there are hundreds of soundboards most of which are likely to infringe copyright. A small copyright infringing App that sells for \$1 seems hardly worth the trouble, until you consider success of the scale of Angry Birds. Can App store operators avail themselves of any safe harbours?
- Security: malware is well understood on a PC, but there is no reason viruses can’t spread through Apps. What else might the App do but not tell you? Can you trust the developer, do you even know who that is?
- Money: It’s not only the App Store that users can do business with. Banking, eBay, PayPal or any account you have with a business that can be accessed via an App can perform transactions. Data charges can also be huge with particularly when roaming and many Apps don’t make it clear how much or how often they access data.
- Privacy: Not just the legislated privacy, but people’s perceived threats to privacy whether or not it is covered by privacy legislation. Users interact with and share data in many layers in an App — the developer, the carrier and the App store, usually without the user really knowing who is doing what and when. Users usually don’t even know what data their App is collecting, let alone sharing — consider the recent difficulties experienced by the Westfield car finding App, with car number plate data being accessible via a website. If Apps are created by users themselves, and users have no way of knowing the integrity of the developer, can the user really trust the developer with their personal details.

Classification

There presently exists a complicated web of overlapping Commonwealth and State and Territory legislation regulating the classification of various types of media in Australia, both offline and online.

What follows is a high-level review of the existing framework.

1. Classification (Publication, Films and Computer Games) Act 1995

The primary legislation that regulates the classification of media in Australia is the Commonwealth *Classification (Publication, Films and Computer Games) Act 1995* (‘the Classification Act’). The Classification Act separates media into three separate categories: publications, films and computer games, with films and computer games in particular defined in a somewhat abstract sense.

Complications arise when each of these different categories of media is treated differently in terms of the categories of classification that may be applied, with publications being classified as either Category 1 Restricted, Category 2 Restricted or Refused Classification (RC), films being rated between G and R18+, X18+ or RC, with computer games facing a different classification scale too, running from between G to MA15+ or RC.

In classifying films and computer games, section 5B of the Classification Act sets out categories of films and computer games exempt from classification, such as business, professional, scientific and educational films and computer games.

The National Classification Scheme, of which the Classification Act is the centrepiece, operates on a submission basis whereby distributors, developers, publishers must submit material to the

Classification Board for classification prior to the material being sold or exhibited in Australia. The Classification Board itself is the primary body charged with classifying films, publications and computer games, with the members of the Board appointed by the Governor General having regard to ensuring the Board 'is broadly representative of the Australian community'.

At least in part and temporarily, the applicability of the Classification Act to Apps has been (or will be) clarified by the Commonwealth *Classification (Publication, Films and Computer Games) Amendment (Online Games) Bill 2011*, introduced to Parliament in November this year, which will exempt 'mobile phone apps' and 'online games' from classification, however the exemption won't apply to RC games and other BAS protections.

2. State and territory enforcement legislation

Enforcement of the Classification Act is achieved through State and Territory legislation. Generally speaking, this legislation prohibits the sale or exhibition of unclassified publications, films and computer games, as well as material that is rated X18+ or RC.

Whilst most pieces of State and Territory legislation follow the same basic blueprint, they are far from being identical. Anomalous situations arise when State and Territory legislation differs in certain practical respects. For example, the majority of State and Territory enforcement legislation outright prohibits the sale of X18+ films. However, section 54C of the ACT *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* allows persons to apply for a licence to sell X18+ films within the ACT under the procedural conditions set out in section 22. Definitional differences can create further discrepancies between States and Territories (e.g. Qld uses a different definition of 'computer game').

3. Broadcasting Services Act 1992

Broadly speaking the *Broadcasting Services Act 1992* ('the Broadcasting Services Act') was primarily designed to provide classification standards for television programs, complementing the Classification Act.

The *Broadcasting Services Amendment (Online Services) Act 1999* broadened the scope of the Broadcasting Services Act to cover online content, creating Schedules 5 and 7, regulating internet hosted content hosted outside Australia and content services, including content available on the internet and mobile services hosted or provided from Australia, respectively. Schedule 7 defines 'content' broadly as being content in the form of text, data, speech, music, visual images, other forms or combination of forms.

The Australian Communications and Media Authority ('ACMA') deals with classification issues for online hosted content through a complaints-based approach. The ACMA investigates complaints about content where the complainant believes that end-users are able to access prohibited or potential prohibited content. The ACMA has broad powers with respect to prohibited content and potential prohibited content, including issuing a take-down notice, a service-cessation notice or a link-deletion notice depending on the type of content. The ACMA also has the power to refer content to the Classification Board if there is a substantial likelihood that it will be prohibited.

4. Print media

Although print media falls within the definition of 'publication' for the purposes of the Classification Act, the reality is the vast majority of print media is unlikely to be refused classification, unlikely to cause offence or be unsuitable for minors, and as such would not be deemed to be submittable material for the purposes of the Act.

Despite not falling within the ambit of the national classification scheme, the print media industry is self-regulated by the Australian Press Council. Membership of the Australian Press Council

includes industry representatives from, amongst others, News Ltd, Fairfax, Australian Associated Press and APN News and Media.

The Australian Press Council operates on a complaints based system. The complaints based process represents an alternative to legal action.

But where does the App fit in?

The Attorney General's Department has informed the Legal and Constitutional Affairs Committee that mobile phone 'games' are regulated by both the Classification Act and the Broadcasting Services Act. Given that the Attorney General's Department has provided no further guidance, it is unclear exactly where the App fits in amongst these pieces of Legislation.

The fact that an App can take and incorporate any number of forms means that it is difficult to fit this multitude of forms within the outdated definition of 'computer game' under the Classification Act.

An App may be identical in form to the traditional computer game or may be completely unrecognisable from it, or it may incorporate any number of forms within its basic design. Furthermore, to attempt to fit the concept of the App within the borders of the Classification Act would effectively require all developers big and small to submit their App for classification lest they fall foul of the State and Territory enforcement legislation, creating an unfeasible burden on the Classification Board.

At present, App stores or 'marketplaces', are already subject to their own form of self-regulation. These marketplaces often feature extensive terms and conditions that App developers who wish to distribute their Apps through these avenues must abide by. The administrators of these marketplaces often have the power to take down Apps that are subject to consumer complaints or otherwise feature inappropriate content. In a sense, this parallels the power of ACMA to issue take-down notices to content providers who host prohibited content.

Classification is another major headache for Apps. Is the App a game or a film? a newspaper? What about social media — there is an App for Facebook and Twitter? Is Twitter a news service? Is it supplied from overseas or locally based? How can anyone properly regulate true user generated content?

By way of example for classification alone, consider the following practical issues for classification:

- If Apps are not classified, distributors are arguably avoiding millions of dollars in classification fees (classification fees range from \$470 to \$2040 for computer games) — reducing possible sources of government revenue, and creating a playing field that is not level.
- If Apps are classified, it is arguably not resource and cost effective for developers to release them in Australia potentially thwarting Australian developers.
- Cost issues further increased exponentially if need to constantly re-classify an App with every update or new version.
- Meaningful classification would require full cooperation, not only with developers, but with App-store providers.

Current reviews

It is well understood that there are a number of concurrent reviews or activities underway. It is the premise of this paper that looking at these reviews from the position of the App is instructive and sometimes helpful to assess or at least take a different perspective on them.

1. Department of Broadband and Communications: convergence review

It seems to be recognised by many that content is content regardless of the way in which it is delivered or platform on which it is consumed. It is contended that the concept of the App as a converged device starts to change the way you might answer some of the questions that are posed around how to regulate it.

Do 'Layers' have a clear meaning when talking about Apps? Through the lens of the App, layers are as potentially as problematic as the vertical silos. In particular the distinction between a service and the content layers is far more blurred. It is not as clear that there is a boundary between the 'content' layer and the 'application' layer. An App can be either.

Regulatory parity seems to become more sensible and concepts of differing regulatory density seem to become less meaningful when everything can be reduced to an App.

Different delivery mechanisms may well need to be regulated for spectrum allocation or free to air TV. Perhaps 'news' organisations warrant different treatment, but an App can be anything and differing regulation of the same App could be confusing.

2. Australian Press Council: independent media inquiry into print media

The Print Media review seems to be cognisant of the challenges presented to the pressures facing newspapers and online news. When an App can clearly replicate the print and TV news media and at the same time aggregate it with other news (e.g. Huffington Post) and embed comedy or drama TV as well as user generated content and games to any platform anytime, the role of the App warrants attention.

3. Australian Law Reform Commission: review on privacy 'For your information'

Privacy issues alone are complex and the ALRC's extensive report is evidence of that. However the App assists in looking at the problem from a different perspective and brings into relief matters that were perhaps not as apparent, at least to the consumer, and may not always constitute a breach of privacy under the current regime.

4. Australian Law Reform Commission: National Classification Scheme Review

More recently, the ALRC has been asked to review the current National Classification Scheme, which has been branded as an 'analogue piece of legislation in a digital world'. In September 2011, the ALRC released a discussion paper on the issue. The discussion paper outlined 50 separate questions and proposals, which included:

- a new *Classification of Media Content Act* that would regulate the classification of all media content
- a scheme that is part of a co-regulatory system;
- mandatory classification only for all films, and for games likely to be 15+ or that may be Refused Classification (RC); and
- that R18+ should have restrictions on access to adults only and remove the access controls requirement for 15+ classifications.

This approach seems consistent with an App view of the world, and it is instructive to consider the questions posed in the draft report from the perspective of an App.

However even the most recent amendment Bill seems to enshrine concepts such as 'online game' and 'mobile phone apps', when clearly Apps are far broader than these 2 subsets.

5. Senate Legal and Constitutional Affairs Committee: review of classifications achieving the right balance

Prior to the ALRC review, and perhaps an impetus for it was the Senate Legal and Constitutional Affairs Committee review of the National Classification Scheme. The Senate Committee concluded in its review that the National Classification Scheme was ‘flawed’ and could not be sustained in its current form, as it had not been successful in creating a consistent approach across Australia. It recommended that the Australian Government legislate for a truly national classification scheme, and an expansion of the scheme to cover all mediums of delivery.

The Senate Committee gave particular significance to the issue of co-regulation. It cited the increasing convergence of media as a reason to ensure that industry self-assessment is balanced with appropriate oversight for classification decision-making.

6. Broadening the Safe Harbour and a potential Copyright Code

The Commonwealth Attorney General has issued a consultation paper to explore giving ISPs more certainty with respect to the Safe Harbour protections. What about App stores?

There has also been increasing talks about the creation of a self-regulated industry code between Internet Service Providers and rights holders to combat the infringement of intellectual property. The Internet Industry of Australia, in the wake of the iiNet decision, announced that it would start work on ‘an industry code of practice for internet intermediaries including ISP’s, search, hosting and social media providers’, there seems little doubt the App store provider would benefit from such a code.

Summary

An App can contain the features of a game, a film, a TV drama or documentary or news and current affairs, radio or newspaper. It can be both real-time (linear) or on-demand, it can be news and entertainment in one, and it can be delivered to any device, anywhere at any time.

Software has always been capable of this, but not in a way that your parents or your grandparents would use. Apps are simple to use and are usually motivated by one clear purpose.

An App is, it is suggested, the ultimate converged device and as such should be used to assist us to navigate our way through the complex issues of regulation and legislation in a converged world.