

SOME POTENTIAL EFFECTS OF TECHNICAL PROTECTION OF SOFTWARE ON COPYRIGHT AND CONSUMER LAW

Jennifer Kellaway

(This article was submitted on 20 July 1984, before the appellate decision in Apple v Computer Edge was handed down, but the issues raised are independent of those considered in that case. Jennifer Kellaway was one of the few contributors to respond to our call for contributions to a special issue of the Newsletter on software copyright: Ed.)

The adoption by some sections of the software industry of technical protections of copyright software has some unusual results which highlight the inappropriateness of adopting copyright as the means of legal protection of computer software.

A piece of software comes into existence when a "computer program" (as defined in the 1984 amendment to s.10 of the *Copyright Act*) is "made" (s.22(1) of that Act) or reproduced in a material form (s.31(1) (i) in a particular way, i.e. when the "expression" is reduced to an appropriate "material form" (as defined in the amended s.10) with the aim and result that the expression is now functioning. If function is separated from expression there is no longer a piece of software. The expression may be in source or object code. If in object code, it can be disassembled to make the code intelligible. There are some gifted individuals who read object code. Reproductions are then "supplied (whether by sale or otherwise) to the public" (s.29(1)(a)). Rights in the copyright are usually not assigned, but a product, a computer program made so that it can function, (a "literary work" as defined in the amended s.10) is sold. Therefore it would seem that the very process by which most items of software are produced and mass marketed constitutes "publication" under the *Copyright Act* of the computer program.

What then of mass marketed software which is technically protected so that the purchaser cannot access the code? It is a classic, basic right of purchasers of a published literary work to see and enjoy the expression of that work. If they cannot access the code, a vital part of their purchase is denied to them. If they cannot access the code they cannot make corrections of spelling or amendments of "Americanisations". Purchasers of books can make corrections as they please for their private benefit.

If, contrary to the view above, such technical protection somehow results in the expression being "unpublished", the vendor still has problems. It is not, I contend, unlawful per se for purchasers to break the technical protection and see and enjoy the whole of the item of software (expression plus function which cannot be physically split), they have purchased, providing they do nothing to breach the copyright in this literary work. If the vendor makes it a condition of sale that the purchaser will not attempt to break the protection, then it seems to me that the vendor faces difficulties in contract. He is asking the purchaser to agree that a term of sale on an item is that, as to a substantial and vital part of that item sold, the purchaser will not attempt to exercise the normal rights and enjoyments. To supply the program by way of licence might still, in view of s.29(1), result in "publication".

Further, both technical protection of this type, and mass marketed software which cannot be copied at all, frustrate the operation of the "fair dealing" provisions of the Act. The first type does so because if a user cannot access the code, that user cannot calculate the permissible copiable portion of a program.)

Then what of a third protection, where a program needs the serial number of the first machine on which it runs, and thereafter only runs on that machine (unless modified by the manufacturer so the whole procedure recurs on a fresh machine)? Such protection causes difficulties ranging from frustrating inconvenience and delay, to rendering a product virtually worthless (e.g. in the case of entities which are multiple users of multiple machines), and seems to make serious inroads into the purchaser's traditional rights of enjoyment and resale.

There is a developing range of methods of technical protection, methods of manufacturing and mass marketing created only to protect that which the law already does protect. There are sections of industry which do not use such methods, yet still apparently prosper. Various such protections appear to raise issues of fitness, merchantability and consumer protection. Remembering that the consumer provisions in the *Trade Practices Act, 1974* speak of "supply", and are not limited to "sale", could there not be potential difficulties in situations of supply of technically protected literary works?

Simply giving the consumer notice of the existence of technical protection might not afford either party the protection it does in other areas. The consumer may fail to comprehend the ramifications (a lot of hardware/software packages are mass marketed with the expressed aim of educating novices). He may be desperate to obtain any software that will run on his machine or operating system. Hence, considerations may also arise under the *Contracts Review Act, 1980* (NSW).

There are other disquieting aspects of technical protection, namely:

(a) Those sections of industry which adopt technical protection seem thereby to admit that copyright protection is insufficient. They further espouse that protection comes in moral and social forms (this Society's press release, 27 June 1984). But it seems to me that technical protection is endangering a sound moral and social climate because it erodes mutual respect between industry and consumer.

(b) If technical protection is allowed to flourish, so that consumers are fed only the "function" and if education cannot enjoy adequate "fair dealing" (and, separately, adequate funding), then Australia may soon be so technologically backward that the great threat of industry being forced to go "offshore" (as claimed by some industry spokesmen following Mr Justice Beaumont's decision in Apple v Computer Edge) may well eventuate paradoxically not because industry had insufficient software protection, but rather because it had too much.

➡ **Publications (cont. from page 10)**

COMPUTER CONTRACTS

Richard Morgan and Graham Stedman; Oyez Longman, London; 2nd Edition 1984; 324pp hard; \$65:00 from Longman Professional, Australia

The 2nd Edition of this book is a considerable expansion of the original 1979 Edition, with chapters providing commentary on hardware, software and maintenance contracts, and special problems related to micros, leases and bureaus, in which general issues are discussed and examples of clauses considered. A further 150 pages of precedents then follow, with the invaluable feature that the precedent clauses are cross-referenced to the commentary, and vice-versa. The book is written from the perspective of English law, so would have to be read with an eye to Australian legislation.

COMPUTER CONTRACTS - An International Guide to Agreements and Software Protection

Hilary E. Pearson; Financial Training Publications Limited, London, 1984; 298pp hard; \$42:50 from Longman Professional, Australia

Aimed at the 'non-technical lawyer and the non-lawyer technician', this book surveys most types of contracts involving computers, mainly from an Anglo-American perspective, and has a number of chapters on special problems of international negotiations. A number of precedent clauses appear at the end of this chapter. The last third of the book surveys international intellectual property protection of computer products up to early 1984, and is a valuable overview.

INFORMATION TECHNOLOGY: THE CHALLENGE OF COPYRIGHT

James Lahore, Gerald Dworkin and Yvonne Smyth; Sweet & Maxwell, London, 1984; 116pp soft; \$25:50 from the Law Book Company

Of the four essays in this book, only Dworkin's deals with software protection, the others dealing with audio-visual and reprographic copyright issues. Dworkin's article considers the suitability of copyright as software protection and reviews the position under the British *Copyright Act*, but was written before the Full Court decision in *Apple v Computer Edge*.

HOW TO PROTECT COMPUTER PROGRAMS

Pal Asija; Law Publishers, Allahabad, India, 1983; 191pp hard; US\$35:00, plus US\$5:00 surface mail from Law Publishers Box 77, Allahabad 211001 India

In this book, according to the publishers, "Mr Asija, presently a practising Patent Attorney at Shelton, USA, shares his experience in obtaining the first software patent ever issued (US Patent 4,270,182). It includes legal as well as technical means of protecting the software. This book is designed exclusively for ingenious Computer Engineers and practising Patent Attorneys. Their interest is guided methodically to overcome the legal maze. He delves in detail his patent accomplishment ever achieved in American Judiciary. For Patent Attorneys it is a beaming feast of the software patent precedents. For Computer Engineers it is a hallmark guide and inspiration to obtain their patent rights." Just when you thought your computerlaw library was complete!



➡ **Protection (cont. from page 7)**

Thus adoption of technical protection highlights the inappropriateness of copyright for the legal protection of computer software. In view of various other difficulties which also arise with applying existing copyright and other laws to the problem, I would respectfully agree with views expressed by Mr Ross McNab in his paper delivered to the National Symposium on Legal Protection of Computer Software (Canberra, March 1984).

Generally, then, our approach should be to define the rights and needs of both authors and the community, and to obtain the consensus of both on legislation appropriate for the national and international forums.

Copyright seems like a good old horse which when working well in known fields was then shackled with strange new devices and forced out into an unknown paddock where it just churned up the earth and then collapsed.

