Fair dealing

How much is a fair go?

Sub-Section 183(1) of the Copyright Act exempts the Commonwealth and the States from copyright infringement of a person's copyright where such use is "for the services of the Commonwealth or State". Sub-section 183(4) requires the owner to be advised and information to be provided to the owner in respect of such use.

The section provides a general statutory licence for the Commonwealth and States in view of their extensive and varied use of software.

The potentially wide ranging effects of that section require urgent clarification for Government users to ensure the practical operation of Section 183 does not affect the reasonable commercial expectations of copyright owners.

In response to a request made by the Australian Information Industry Association, the Commonwealth Attorney General, Mr. Lionel Bowen, has indicated he considers it is desirable to examine the question whether, as a matter of policy, it is appropriate for the Commonwealth to rely on the section in all cases where it may be legally possible to do so.

Mr. Bowen has directed his Department to seek the views of a cross-section of interested persons with a view to determining the circumstances in which it would not be appropriate to rely on the section and to determine whether amendments are desirable to streamline its practical operation.

A chance may have gone begging recently to test the 1984 amendments to the Copyright Act relating to the protection of software in light of the High Court Decision in *Apple v. Computer Edge*, as well as the ability of 'shrink-wrap' licences employed by some software vendors to restrain breach of copying conditions.

The Queensland Department of Education, by way of circular, notified all TAFE colleges that a college may purchase a single copy of a software program and that, as long as a contract to the contrary was not signed, the College may permit a teacher to copy the software as many times as required for instructional purposes.

Further, the view expressed was that a teacher may copy software at one College, take the copy to another College and copy this copy as many times as required for instructional purposes. It was stated that this did not apply to software used for administrative purposes.

The basis for this view may well have been Section 200 of the Copyright Act, which states in part that copies made in the course of educational instruction do not infringe copyright unless made "by the use of an appliance adapted for the production of multiple copies".

Perhaps the Department concluded a computer which is able to make a fast single copy is not a device "adapted for the production of multiple copies". Such an interpretation would conflict with Section 40 of the Act, which deals with fair dealing for the purposes of research and study (allowing the reasonable proportion only to be copies) and Section 53B.

S.53B grants a statutory licence to educational institutions which allows copies of only a reasonable proportion of a separately published work such as a computer program, provided records are kept by the educational institution for the purpose of providing equitable remuneration to the copyright owner.

The interesting case of *Haines v. Copyright Agency Limited*(1982) 40 ALR 264 held that as S.53(B) required an educational institution to give equitable remuneration to the copyright owner, such institutions may make copies that would not otherwise be fair dealing under S.40.

However, that case did not suggest multiple copies of the whole of the work could be made. The same conclusion can probably be drawn with respect to S.200.

Following representations made to the Department by solicitors on behalf of a software vendor (who incidentally did not employ any licence agreement in connection with the supply of its software), the circular was withdrawn.

Of course, if the circular had been based on an erroneous interpretation of S.200, it may well have amounted to an incitement to commit breaches of copyright - a criminal offence, as well as an infringement of the copyright owner's rights pursuant to the Act.

Nigel H. Hutchinson,
Solicitor for Unisys Limited

Youth Hostels Association

The Society's role in computer law has recently received some recognition by the Youth Hostels Association of NSW.

In a recent communication between the secretary and Mr. Bruce Baldwin, Chairman of the Computer Sub-Committee YHA, we were asked to find an expert to act as an expert and not an arbitrator, to assist the Youth Hostels Association of NSW and their software house to resolve an impasse that had developed.

The YHA had entered into a contract with a software house to produce certain software in relation to their reservation procedures in NSW. During the conduct of the contract, disagreements arose between the YHA and the software house relating to the function of the software and its adequacy.

The agreement governing the conduct of both parties contained the following clause:

"DISPUTES

.5 Any dispute between CDA and the Customer as to whether or not the Customer should reasonably be satisfied for the purposes of this Agreement shall be referred for determination to a person nominated by the President of the NSW Society for Computers and The Law, who shall act as an expert not an arbitrator and whose decision shall be final and binding. CDA shall bear the costs of such determination unless it is determined that the Customer should reasonably have been satisfied as aforesaid, when the Customer shall bear such costs."

Mr. Baldwin contacted the secretary of the Society to arrange for the appointment of an "expert" to assist in the resolution of this dispute.

After discussion with other members of the Executive, an expert was chosen and this information was related to Mr. Baldwin. However, in the meantime, the dispute had been resolved between the parties.

The Society is more than willing to advise all organisations in such a matter and has at its disposal a number of people who would be able to assist under such circumstances.

David Lewis