

## From The N.S.W. President

### Intellectual property in Asia

Recently I took part in a delegation of computer lawyers to Asia. The 30 delegates represented a total of 12 countries, mainly the US and Europe. Included in the group were a number of members of other societies for computers and the law, including the president of the Dutch society. China, our first point of call, has never had a Copyright Act but all the indications are that this will soon change; part of the aim of the delegation was to aid the Chinese authorities in their deliberations as to whether software should be protected under the new Act.

The people we met, which included the standing committee of the National Peoples Assembly which is charged with drafting the Act, were all extremely well informed as to copyright issues, including the latest look and feel developments in the US. The impression I gained was that the Chinese realize that they have a wonderful opportunity to draft a sensible Copyright Act without having to be bound by preconceptions that, for instance, it is 'natural' to grant copyright for the life of the author plus fifty years. One danger faced by the Chinese that in trying to draft the 'perfect' Copyright Act they will never be satisfied with their draft and the Act will never be finished. Before finalizing the recently (1984) introduced Patent Act the Chinese apparently consulted experts in 30 countries, the USSR and East Germany as well as Western countries.

None of the people we discussed the matter with would commit themselves to a

timetable for the introduction of a Copyright Act, although while we were in Beijing the Chinese Copyright Agency opened its doors for the first time. Estimations varied from one year to three years for the introduction of the Act; everyone was definite that an Act would not be introduced during 1988.

In general software is not patentable in China. Although the patent office is becoming more flexible in this regard, software will be patentable if it is intertwined with the functioning of the hardware.

There is no guarantee that the Copyright Act when it appears will protect software. There is no doubt that the Chinese are considering sui generis protection for software. We were asked many times about the possibility and the effect it might have. Although there is no real semiconductor chip industry in China at this stage our hosts were also very well informed on the issue of semiconductor chip protection and how they are being protected in the different jurisdictions around the world. I gained the impression that the Chinese are considering becoming a producer of semiconductor chips in the not too distant future.

In drafting a Copyright Act the Chinese are aware of the necessity to conform to the Berne Convention and/or the Universal Copyright Convention if they wish protection to be effective. There is an overriding consideration with software however – is it in the economic interests of China to grant it a form of protection

which is effective internationally? At the moment there is nothing to stop the use of 'pirate' software in China and this has an obvious advantage for Chinese business and in helping the population become computer literate. There is no immediate prospect of Chinese software being exported and so there would be no loss on that front in the near future.

It is impossible to say at this stage which school of thought will be successful eventually – apparently there is at least one draft Copyright Act which includes software protection and one which does not, as well as draft sui generis law. It will be very interesting to observe the result from a country which appears not to have to bow to any foreign pressure and will be able to draft the intellectual property laws which it perceives to be in its best interests.

The delegation also visited Japan where we had discussions with the Japanese Computer Law Society. As with the rest of the world computer law is of increasing interest to the Japanese, although as with the rest of the Japanese commercial system, lawyers are rarely consulted – there are only 13,000 lawyers in all of Japan (across the China Sea one quarter of mankind makes do with a mere 30,000 lawyers). The Japanese Copyright Act specifically covers software. Japan was the first country after the United States to introduce sui generis protection for semiconductor chips.

In Hong Kong we had a very interesting discussion with a

person who took part in the raid earlier this year on the Golden Arcade (the centre of illegal software distribution in Hong Kong). The raid has resulted in charges being laid against approximately 20 people. A visit to the arcade, however, revealed that business is still booming. Probably 100 shops were offering manuals and discs for sale with no pretence that they were anything other

han pirate. There must be money in piracy; one of my fellow delegates purchased a large amount of pirate software to take back to the US to show his clients. A chance meeting on the street an hour later with the couple who were serving in the shop resulted in an invitation to dinner at their very nice new apartment. Our hosts wore what must be one of the few genuine Rolex watches in

Hong Kong.

It is certain that Asia is becoming ever more aware of the problems associated with intellectual property protection of computer products. The needs as well as the practical difficulties of enforcement and the economic consequences of doing so are all being thoroughly examined.

**Jim FitzSimmons**

## **VICTORIA HACKS BACK CRIMES (COMPUTERS) ACT 1987**

The Victorian Parliament passed a Bill on 24 May 1988 amending the Crimes and Summary Offences Acts to make certain further provisions for offences relating to the manipulation of computers and other machines and the falsification of documents. This Act is yet to be proclaimed but is expected to be in force by the end of the year.

### **INTRODUCTION**

The main purposes of the Crimes (Computers) Act ("the Act") are to:

1. ensure that major fraud offences apply to conduct involving not only dishonest manipulation of the traditional written documents but also of articles and documents produced by or stored in

computers or other machines;

2. create new offences covering the falsification of computer related articles such as computer stored records, disks, tapes and automatic teller machine cards (ATM cards) and of other instruments not in "written form";
3. create a new offence relating the innocent but unauthorised entry into computers i.e. "hacking";

### **FRAUD AND BLACKMAIL USING COMPUTERS**

The Victorian Government has taken into account the extensive reports prepared on the subject of computer related crime by the Tasmanian Law Reform Commission, the standing Committee of Attorneys General, the Queensland Government's proposed Green Paper, the Scottish Law Commission's paper and the OECD's report outlining the consideration given to these issues in the 12 other Western European countries. The striking feature emerging from these analyses was that the overwhelming

majority of activities commonly thought of as computer related crimes were adequately dealt with by existing criminal offences carrying substantial penalties. Traditional offences such as theft, criminal damage, obtaining by deception and false accounting, some of which have been known to the law for centuries, were thought to be readily applicable to offences involving even the most modern technology.

The Victorian Government saw the main difficulty with the present criminal law in relation to computer fraud as being the many narrow legal rulings of the meaning of "deception". The existing major fraud offences in the Crimes Act such as dishonestly obtaining property or a financial advantage by deception require proof of "deception" as an element of the offence. There exists some doubt as to whether this term in its ordinary meaning was wide enough to cover behaviour involving deception directed initially not at another person but at a computer or other "machine". It was noted that some prosecutions in England have failed for this reason.

Indeed there are where