Copyright Piracy Prosecuted

• *David Lewis*

In a most significant judgment on January 10, 1991, the St James Local Court in Sydney convicted Peter Martin Olsen, computer programmer with the Commonwealth Bank of five charges under sec 133A(1) of the Copyright Act 1968 (Cth) of causing to be published in Australia an advertisement for supply in Australia of computer programs which he ought reasonably to have known were infringing copies .

Mr Olsen was also convicted of one charge under sec 132(2)(a) of the Act to the effect that on 11 May 1990 when copyright subsisted in certain works, that is computer programs, he had in his possession disks for the purpose of selling and he ought reasonably to have known that the software contained on those disks were infringing copies of those works.

The Court was told that Mr Olsen attended a garage sale in early 1990 at which he purchased 400 51/4 inch disks at ten cents per disk. These disks contained Apple IIE software illegally copied by a NSW school teacher. The Court accepted that it was Mr Olsen's original intention to reformat these disks to run on his IBM compatible computer.

Subsequent to the purchase Mr Olsen decided to sell the software on the disks at between $1 and $3 per disk and advertised these disks in the Trading Post on five separate occasions. After selling the first 400 disks Mr Olsen acquired a further 1100 disks from the aforementioned school teacher for the purposes of resale and at least a further 400 were sold prior to his apprehension by the Federal Police.

Evidence was given to the Court by Mr Olsen that it was his opinion that the disks had been legally copied under licence by the teacher at his school as approximately ten percent of the disks bore a sticker with the name of the school and/or the teacher's name. It was Mr Olsen's evidence that this alone was sufficient to indicate that the disks were legal copies. Mr Olsen also argued that the teacher had indicated that the disks were legal. The Court rejected Mr Olsen's evidence as "unacceptable".

The Court held that as it was Olsen's intention to reformat the disks at the time of purchase there was no need to enquire as to the legal status of the software contained on the disks. Therefore the Court concluded that no inquiry was made by Olsen in relation to the software. Notably the teacher admitted in his evidence that he was aware that the disks were illegally copied. The teacher had been granted an indemnity by the Department of Public Prosecutions only days before the hearing commenced in December 1990.

It was established that Mr Olsen was a computer programmer held in high regard by his superiors at the Commonwealth Bank and that he would have been aware of the security measures employed by the Bank in relation to software. Additionally it was noted that Olsen had been working on various software projects with the Bank and that the software produced was to be protected by copyright and that Mr Olsen was aware of this fact.

Knowledge

As copyright subsisted in the relevant programs and it was established that the copies in Olsen's possession were illegally copied and were being sold by Olsen, the only issue left for determination by the Court was that of knowledge.

In **DPP v. Olsen,** the Court held that Olsen ought reasonably to have known that the relevant disks were infringing copies particularly in the light of his employment as a computer programmer with the Commonwealth Bank for in excess of 12 years. The Court clearly accepted the tests of knowledge proposed by the DPP by finding that:

1. Actual knowledge was not required under section 132 of The Act;
2. Olsen had the means of knowledge;
3. Shutting of the eyes is actual knowledge;
4. Olsen had shut his eyes to the true situation;
5. It would be very obvious to Olsen by virtue of his experience at The Bank that there

was a real likelihood that the disks were infringing copies;

6. Olsen should have made inquiries in relation to the status of the disks as a reasonable and prudent person; and therefore

7. Olsen ought reasonably to have known that the disks were infringing copies.

Olsen was found guilty and fined $750 on each charge totalling $4,500 in fines. In addition he was ordered to pay $4,937.56 in witness expenses including some of the costs of the preparation of affidavits by the holders of the exclusive software licences in Australia. It was asserted by Counsel for Olsen that the guilty verdict will result in the termination of his employment with The Bank together with other significant personal ramifications.

Conclusions

This decision is most significant for the software distribution and production industry in Australia as, for the first time, it establishes a precedent in the enforcement of the anti-piracy provisions of the Copyright Act relating to software.

The Court considered the price at which the disks were sold to Olsen to be of considerable significance as this indicated that the disks were purchased at such a low price indicating that 'disk value' only was the relevant criteria. Also on the knowledge issue the test applied appears not to be the 'reasonable programmer test' rather the 'reasonable person test'. The status of the defendant as a programmer was relevant only to establish the knowledge of this particular defendant.

The decision did not in any way suggest that absence of programming skills would of itself alter the status of knowledge held by a defendant in a similar matter. ■

David Lewis is Chairman of the Australian Software Distributors Association Incorporated.

ASDA is an Association incorporated under the Associations Incorporation Act 1984 (NSW). ASDA was set up in October 1989 to represent the interests of small to medium size Australian software distributors. The member companies account for the majority of sales in the games and educational software market throughout Australia and New Zealand.

ASDA's principal concern at this time is to eliminate the proliferation of software piracy and parallel importing of software in Australia.

ASDA and its members Ozi-Soft, Questor, Mindscape International, Dataflow Computer Services and Electronic Arts continue to act as an industry watch-dog in this field and, with close links to The Federal Police, Educational Institutions and Government, they will continue to assist in the process of protection of our copyrights.

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