

# Copyright Uncertainty Crucifies the IT Industry

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When is enough enough? When is somebody going to stand up and stop the uncertainty created by copyright law development in Australia?

As industry was being crucified by the Apple case the government moved and of course amended the Copyright Act to defined software as a literary work and thereby make it covered and protected by copyright. The amendments however were arguably not entirely effective because, first, there remain a number of issues unresolved under the new provisions (such as the copyright status of object oriented software and the nature of a reproduction) and, second, the provisions still have not prevented the courts from focussing on the function of software as a determining factor in protection. In addition, the overall Copyright Act arguably continues to be too technologically specific - hence the latest terms of reference to the Copyright Law Review Committee.

The most recent chapter in the software copyright saga is the Data Access v Powerflex Services case, which is currently on appeal. As you will read in this issue, that case (decided earlier this year by a single justice of the Federal Court in Victoria) has compounded existing uncertainties in the law on the copyright protection of software. The

uncertainties arise from the focus by the court in that case on the function of particular commands as once again being a determining factor in deciding whether to grant copyright protection. The result of the case is that copyright protection was granted in relation to individual words or commands in the program in question. This result takes copyright law to new levels of confusion, allowing the uncertainty which has plagued the industry since 1984 to rise again.

One can only hope that the CLRC will consider the implications of the Data Access decision (and the judgments in any appeal) in their recommendations to the government under their latest terms of reference to simplify and modernise the Copyright Act. The editors note that the consequence of the case may be on a practical level that software developers cannot rely on the law in Australia, leading to an exodus of development to other countries where new code is less likely to infringe copyright in individual words or commands of another program.

In addition we have the peculiar distinction of having a litigated authority in Australia on the legal nature of shareware (as distinct from freeware), under the Trumpet

Software v OzEmail case. While the facts of the case were sufficiently extraordinary to warrant coverage in the Journal of the decision, the law laid down may not be quite so extraordinary. The decision seems to be grounded in a traditional analysis, although the clarification provided as to the legal characterisation of shareware and the rights attaching to it may not always reflect the commercial realities in the marketplace. To that extent this case may have also created some uncertainty in the law relating to copyright protection of software generally. Readers can enjoy some detailed analysis of the case in two articles in this issue.

Also in this issue are interesting articles on the protection of databases under Australian law, issues surrounding copyright on the Internet, copyright law in Spain and other feasts of reading. The editors hope that you all enjoy this bumper issue, our third this year (as we strive to continue our commitment to provide you with a regular Journal which is distributed each quarter - see the inside back cover for deadlines and release dates).

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The editors welcome (on behalf of the NSW Society), those persons who have joined the NSW Society as new members since the publication of the last issue of the Journal. They are:

## ***New Individual Members***

Mark Ferguson	Telstra Applied Technology
Nigel Hamilton	University of Technology Sydney
Barbara Hugh	Blake Dawson Waldron
Andrew Lim	
Kenzie Messer	Independent Medical Opinion
Leigh Miller	Loughlin McGuire
Robert Neely	Minter Ellison
Glen Turvey	Initiating Explosive Systems Pty Ltd
Garry Voutos	Willis Corroon Richard Oliver

## ***New Corporate Members***

CSIRO Division of Information Technology	Philip McCrea, Kate Brown, Ian Gorton
Law Foundation of NSW	Sandra Davey, Brad Drysdale, Simon Rice
Systematics Pty Limited	Ian Chivers, Sandra Miller, Ken Simington, Rona Davis, Kate Napier