

# Indian giving?: Shareware and the Trumpet Software Case

Kate Watts

---

Initially, the dispute between Trumpet Software Pty Limited (**Trumpet**) and OzEmail Pty Limited (**OzEmail**) seemed to be no more than the usual sound and fury. However, the case has turned out to be a milestone in the field of copyright on the Internet and the use of shareware, because it clarifies the copyright status of material freely available over the Internet, and the nature of the implied licence to use shareware.

Trumpet owns the Trumpet Winsock Program, well known as a program for establishing connection with Internet service providers (ISP's). An ISP facilitates access to the Internet through the ISP's server. Most businesses and individuals not connected with education institutions use an ISP to connect to the Internet.

Winsock 1.0A was released on 1 February 1994 and has since become one of the most commonly used and recommended softwares for obtaining access to the Internet. The American publication "More Internet For Dummies" (which has claimed sales of 9 million) rates the Winsock program as the best in the world.

Enter OzEmail Pty Ltd, an ISP who in late 1994 put a proposal to Trumpet regarding distribution of the Winsock 2.0 program by OzEmail. OzEmail wanted to distribute around 60,000 copies of the unregistered version of Winsock on the cover of the April 1995 edition of Australian Personal Computer. It offered to do this free of charge to Trumpet.

OzEmail gave evidence that at the time of making this request to Trumpet it believed that OzEmail could in any case distribute the Winsock program, because the Winsock program was "shareware". "Shareware" is software that is generally made freely available to

users so that users may evaluate the usefulness of that software. If users wish to acquire the software they must then forward registration or licence fees to the owner. Until recently, the success of the shareware concept has depended on the honesty of the users. However timelock protection can now be added to shareware, operating to make that shareware unusable after a given time if registration does not occur.

Distribution of shareware takes place either in physical form by disk or through the Internet by downloading it from an FTP site.

Since the Winsock program was shareware, OzEmail assumed (and later received legal advice to the effect) that there existed a general licence for the public to use and distribute shareware, and that permission to do so was not legally required.

Mr Tattam, the developer of Winsock and Managing Director of Trumpet, refused OzEmail permission to distribute the Winsock program. He did so on the basis that the then current untimelocked version of Winsock was about to be replaced with a timelocked version. Tattam told OzEmail that he would be happy for OzEmail to distribute a timelocked version of Winsock. However, the timelocked version of Winsock was not ready in time to meet OzEmail's promotion launch in Australian Personal Computer. OzEmail had committed to the launch with Australian Personal Computer and feared a damages claim from Australian Personal Computer if it pulled out of the promotion. As a result, OzEmail decided to go ahead with the promotion without the permission of Trumpet. Simultaneously, but without knowing of OzEmail's decision, Trumpet sent

OzEmail a letter requiring it to destroy all unlicensed copies of all versions of Winsock in its control. OzEmail sent back a letter replying:

*"I'm not sure that you understand the concept of shareware: it encourages the complimentary distribution of unregistered versions of software to as wide an audience as possible in order to encourage the largest number of individuals as possible to remit a registration fee to the author. To this end, OzEmail will no doubt contribute significantly to Trumpet Software International's revenue."*

However, the Winsock 2.0 program distributed by OzEmail in April 1995 contained no mention of the payment of a registration fee to Trumpet for the use of its program. The Winsock program had been modified by OzEmail so that the login file connected the user of the Winsock program immediately to the OzEmail network (rather than to other ISP's as determined by the user in the unmodified Winsock program). The modifications also made it unlikely that a user would realise that a registration fee was payable to Trumpet.

Trumpet immediately complained to OzEmail on the basis that any permission given to OzEmail to distribute Winsock had been expressly withdrawn. Secondly, Trumpet was unhappy with the modification of the login file, arguing that the modification was misleading and deceptive because it was likely to lead members of the public to believe that the modifications were authorised by Trumpet and that there was some commercial association between Trumpet and OzEmail. Thirdly, Trumpet complained on the basis that distribution of software without permission amounted to a breach of

---

## Shareware and the Trumpet Software Case

---

copyright, and that modification and distribution of the software by OzEmail for the purpose of attracting custom to the OzEmail network took OzEmail's actions outside the shareware concept. Fourthly, Trumpet complained that the manner in which Winsock was distributed and packaged was likely to result in a great number of users proceeding to use Winsock without registering it with Trumpet. Fifthly, Trumpet complained that the distribution of a Winsock program configured to operate only with OzEmail could jeopardise Trumpet's prospects for doing business with other network providers in Australia.

OzEmail's solicitors responded, arguing that as shareware is generally available it could be generally distributed, except where expressly prohibited by the licence contained in the software itself. In August 1995 OzEmail again distributed Winsock 2.0 in Australian PC World. This version of Winsock had been more heavily amended by OzEmail as follows:

- The Read Me file containing information about the creator of Winsock and that Winsock was registered shareware had been deleted;
- The "Bye" file that allowed the user to hang up or close off the modem had been altered with the potential that the modem in some cases might not have hung up;
- The "Install" file, informing the user of copyright in the program and containing disclaimer information, registration details for registering the software with Trumpet and the status of the software as shareware, had been deleted.

At this point Trumpet commenced an action against OzEmail and some of its employees for breach of copyright and misleading and deceptive conduct. Trumpet succeeded on both counts.

### Findings

#### Copyright

It was not in dispute that computer programs are copyright and that Trumpet owned the copyright in Winsock. What was in dispute was whether OzEmail had an implied licence to reproduce the Winsock program. Justice Heerey of the Federal Court found that any licence which existed had been revoked by Mr Tattam's express statement to OzEmail that he objected to OzEmail using Winsock version 2.0.

Ironically, if OzEmail had *not* asked Trumpet permission to distribute its software, it may not have been in the position where Trumpet could expressly revoke the licence to distribute that software and communicate that revocation to OzEmail. However OzEmail would still have had to distribute the software in its unamended form for it to remain on the right side of copyright law. This would have been a less attractive option to OzEmail since the Winsock program would then not have automatically selected OzEmail as the user ISP.

#### Revocation of a shareware Licence

The Judge dismissed OzEmail's argument that because the Winsock program was shareware the licence to distribute could never be revoked. The Judge found this a particularly surprising argument in view of the fact that no payment had been made by OzEmail to Trumpet for the licence.

The Judge did not consider the issue of the amount of notice that had to be given before the licence could be revoked. OzEmail did not argue that reasonable notice was required so the Judge did not make a decision on this point, simply flagging the issue. In any case the Judge found that the licence to distribute Winsock was revoked effectively in the course of the conversation between Tattam and OzEmail employees in March 1995. The Judge added that in any event, no question of reasonable notice could arise in this case because OzEmail was seeking permission for future use, rather than current use, where it

would have required time to make alternative arrangements.

This issue is potentially an important one for non copyright owner/distributors of shareware, since this may be the way in which the immediate revocations of the licence to distribute shareware can be contested.

The Judge also considered OzEmail's argument that Trumpet was estopped from revoking the licence because OzEmail as licensee had acted to its detriment in reliance on the understanding that it would be able to distribute the Winsock program. The Judge dismissed this argument stating that OzEmail had arrangements with its publishers without any reliance whatsoever on any conduct of Trumpet. The Judge noted "in colloquial terms, OzEmail seems to have taken a punt that necessary permission would be forthcoming from Trumpet or that, whatever happened Trumpet would not sue".

There had been some discussion earlier on in the case about communication between OzEmail and Tattam in December 1994 regarding the promotion of the Winsock program by OzEmail. OzEmail argued that it believed from that conversation that it was able to go ahead and distribute the Winsock program, but the Judge found that this was not actually the case. It is clear then that OzEmail's "reliance" argument had little chance of succeeding, since when it contacted Trumpet four months before the promotion regarding the use of Winsock, no permission to use Winsock was given. However, in addition to the Judge's view that OzEmail was relying on Trumpet either giving in and giving permission or on Trumpet's reluctance to sue, there was OzEmail's belief that shareware was freely distributable. In a way, OzEmail's problem can be seen to have arisen from its attempt to do the right thing and contact Trumpet regarding the distribution of Winsock. If it had not done this, there could of been no notice given to OzEmail

---

## Shareware and the Trumpet Software Case

---

regarding Trumpet's disinclination to permit OzEmail's distribution, and Trumpet's express revocation of the licence would have been less likely.

### *Terms of the Licence (if not revoked)*

Trumpet argued that if the publication of a program as shareware gave third parties such as OzEmail an implied licence to distribute it, then any licence to distribute was subject to the conditions that distribution should:

- occur without any other software;
- occur without modification or deletion of any part of the shareware;
- distribute the shareware in its entirety; and
- should be made without charge and not for commercial gain.

This was based on the argument that distribution was only allowed for the purposes of facilitating the major reason for distributing the shareware, ie to allow users to use the shareware for thirty days for the purpose of evaluation.

Both sides called evidence regarding the nature of terms and conditions of shareware licensing. The Judge found that the evidence fell well short of that required to establish "custom" in the legal sense. The kind of "custom" the Judge said was required must be "so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself".

The Judge found that it was essential that in the case of a distributor dealing with shareware that it be distributed in its entirety and without modification, addition or deletions. He accepted Trumpet's argument that the whole purpose of evaluation is to enable the end user to evaluate the product as produced by the author. However, he disagreed with Trumpet's argument that shareware had to be distributed by itself and not with other software, as long as such software was sufficiently separately

identified and didn't interact with the shareware in a way which interfered the operation of that shareware.

The Judge also found that it could not be a condition of a licence to distribute that the distributor did not thereby make any charge or commercial gain. Indeed, the Judge thought it was irrational to suppose that a distributor conducting a business would distribute shareware without a commercial aim in mind.

In conclusion, the Judge found that even if any licence in favour of OzEmail had not been revoked, OzEmail breached conditions of that licence by the changes to the Winsock 2.0 program.

### *Trade Practices Act*

Trumpet's first claim under the *Trade Practices Act* was that OzEmail's conduct would mislead or deceive readers of a magazine into believing that OzEmail had the permission, licence or authority of Trumpet to publish the shareware. The Judge found that this claim was made out.

The second claim was that the conduct of OzEmail would be likely to deceive or mislead readers into believing that the users of the software did not need to obtain a licence from Trumpet in order to use the Winsock software. The Judge also found that this claim was made out. The brochures attached to the free disks referred to "free software", and the alterations to Winsock 2.0 obscured its shareware message. The emphasis in the brochures on OzEmail's fee of \$25 (which is the same price as the Trumpet registration fee) would tend to mislead most users, the Judge found, into thinking that that was all was payable.

### *Damages*

Damages are so far yet to be decided. The assessment of damages payable for breaches of s.52 of the *Trade Practices Act* usually follows the measure of damages in tort. The type of damages available in copyright include damages for depreciation in value caused by the infringement of the copyright. The Court also has

additional power to award such damages as it considers appropriate, including aggravated and punitive damages.

### *Conclusion*

The message this case contains for distributors of shareware is that although they may have an implied licence to distribute that shareware for their own gain, they are strictly limited as to what else they may do with that shareware, and must beware of the possibility that that licence may be revoked at any time.

*Kate Watts is a solicitor at Gilbert & Tobin. The views expressed here are hers, and not those of the firm or any client's of the firm. An on-line copy of this paper can be found at <http://www.gtlaw.com.au>*