Information Technology

Copyright Developments

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A colleague of mine who practices in the Kingdom of Jordan recently sent me a copy of his firm's Intellectual Property Newsletter. Featured, as one of the articles, was the fact that judges in Saudi Arabia had recently decided that copying computer software without permission was illegal. The concept of intellectual property existing in computer software is well established in Australia and other western nations and this recent decision indicates the global nature of those rights being recognized and leveraged.

Copyright and the Internet
Not only do copyright owners have to deal with varying protection for their work around the world, but the expansion of cyberspace as a lawless frontier also presents new legal challenges to be tackled.

In *The Shetland Times Ltd v Wills and Zetnews Ltd*, Shetland Times (ST) published a newspaper - The Shetland Times, and the defendants published another newspaper - The Shetland News (SN). ST recently established a web site on which they feature various articles from their paper. SN also operates a web site, which had links to headlines on ST's site. By using these links, readers bypassed the need to visit ST's home page and did not see the advertisements placed there. ST claimed this was an infringement of copyright as SN reproduced the headlines from ST when providing the links and the text of the articles when it was displayed on the user's screen. The Scottish Court granted an interim injunction preventing SN from using such links. The basis for the decision was that incorporation of headlines ("links") provided at another site constituted an infringement of the copyright that subsisted in the headlines and their articles as cable programs and the headlines alone as literary works. Whether a copyright infringement has occurred is expected to be finally determined by the Court later this year.

The US case of *Ticketmaster Corporation v Microsoft Corporation* also deals with the question of copyright infringement and web sites. Microsoft linked one of its web sites (http://seattle.sidewalk.com) to the Ticketmaster web site (http://www.ticketmaster.com). Ticketmaster claims that this linking enhanced the value of Microsoft's web site while diminishing the value of Ticketmaster's web site by, amongst other things: depriving Ticketmaster of advertising opportunities; publishing erroneous information; and diluting the value of Ticketmaster's relationship with MasterCard, a major advertiser. Ticketmaster is pressing claims for, amongst other things, trade mark infringement and misleading and deceptive conduct.

These are two well publicised cases, but there are countless other matters involving the unauthorised reproduction of text and graphics and in some instances, entire web sites. The relative ease by which materials may be accessed worldwide and copied raises great difficulties in monitoring copyright infringement and in determining the appropriate jurisdiction for legal action.

There are other Internet related issues such as the purchase and downloading of software from international sources which are only just starting to encourage debate. Matters including parallel importation and sales tax will undoubtedly be under wider judicial and legislative review in the near future.

Parallel Importation
Copyright and computer software is a volatile mixture, which has been known to provoke passionate arguments especially in the area of parallel importation. Many individuals maintain that there should be nothing illegal about importing copies of software, which have been manufactured legally overseas. Current Australian law dictates that importing legal copies of software without the permission of the Australian copyright owner amounts to the same offence as illegally reproducing copies in Australia.

In this regard, the veil of corporate protection has been largely removed. If a company is found to have infringed the copyright owned by another party, the directors or managers of that company may be found personally liable for such infringements by authorising or procuring such conduct by or on behalf of the company. In December 1996, Steven Lagos, a director of the company Palm Beach Pty Ltd was found to have infringed Microsoft's copyright in the case *Microsoft Corporation v Auschina Polaris Pty Ltd & Ors*. In that case, Palm Beach Pty Ltd had imported unlicensed copies of Microsoft programs into Australia. It

was found that Lagos knew that if the copies had been made in Australia they would have constituted an infringement of copyright and that he had authorised or procured the infringement. It was ordered that he had to personally pay Microsoft the value of the unlicensed programs without any deductions to be allowed for the purchase price and other pre-sale expenses.

In a similar case, *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd*, the importation of copies of a computer program into Australia without authorisation from the copyright owner was considered to be an infringement of copyright. This was despite the fact that the copies were original and obtained from a licensed distributor overseas. The actions of parties sued for copyright infringement under such circumstances will be examined to determine whether the infringement was flagrant or not. If you have been notified by an exclusive licensor that you are infringing their copyright, and you continue to do so, the damages awarded by the Court for your infringement can be drastically increased. Many parties dispute the current parallel importation laws in Australia, but flagrant infringement of copyright by continued importation can be an expensive and ineffective method of demonstrating your point of view.

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The question whether a new software program infringes the copyright in an existing software program has been a common cause of copyright disputes. In general, the US has lead the way for judicial decisions primarily due to the fact that there is a far greater scope of matters being heard in the US than in any other jurisdiction. Until recently, the Australian courts' interpretation of copyright infringement arising from similar software programs has substantially differed from the US.

A Change in Direction for Copyright in Australia

Developments in Information Technology are often built upon foundations laid down by other parties' earlier work. In order to encourage users to transfer to new software, features that they are familiar with are often incorporated into new software to ease and encourage the users' transition from one program to another. The incorporation of similar features has always gone hand in hand with allegations of copyright infringement.

In June 1997, the Federal Court of Australia handed down a decision in the matter of *Powerflex Pty Ltd v Data Access Corporation* that changes the direction of copyright protection in Australia. This matter had been appealed from an earlier decision that certain words such as "save", "display" and "find" were computer programs, and therefore copyright works, belonging to Data Access. The new decision has held that these words do not in themselves or collectively constitute computer programs. Australian case law has accordingly now been brought more into line with recent US rulings such as *Lotus Development Corporation v Borland International Inc* in which the US Supreme Court refused to grant copyright protection to Lotus 1-2-3's spreadsheet command menu. It was also found that the macros contained in the Powerflex program did not infringe the copyright in the Data Access program. However, a Huffman table in the Powerflex program was found to have infringed Data Access' copyright. This case should not be construed as removing the possibility of a "look and feel" claim, however, it does make such a claim more difficult to maintain. Interoperability appears to have now, until resolution of the pending appeal in this matter, been given the judicial nod in Australia.

Copyright related to information technology is not limited to computer software alone. The use of the software often results in the creation of works which themselves are afforded copyright protection.

Copyright and Computer-ised Records

There is ongoing debate regarding the degree of copyright protection to be afforded to data, which is compiled using the software. It is argued that although there is no copyright subsisting in a fact itself, a compilation of facts does involve certain planning and construction and therefore has copyright protection.

In a recent US decision in *The National Basketball Association v Motorola*, the NBA had obtained an injunction preventing the sale of a hand held pager produced by Motorola and used to display scores and statistics from NBA games as they are played. Motorola appealed against the injunction and the Court found in their favour. It was held that updates of NBA games gathered and transmitted by pager did not constitute an infringement of copyright or misappropriation of "hot-news". The Court took into consideration the fact that

Motorola collected and transmitted the data at its own expense and had not benefited from free-riding on a NBA product. It was noted that Motorola was not infringing the copyright owned by the NBA in producing the games and live broadcasts of the games.

The copyright protection for collation of copyright works, in contrast to a collation of facts, will depend upon the terms of your licence to use those works. In the May 1997 US District Court case *Hyperlaw Inc v West Publishing Company*, West maintained that it had copyright protection with respect to Judges' opinions from the US Supreme Court and the Circuit Courts of Appeals, which it publishes in law reports. Hyperlaw produces a CD-ROM product that contains Supreme Court and Circuit Court of Appeals decisions. Hyperlaw uses West's publications as a source of cases, which were heard before Hyperlaw began collecting Court decisions and West claimed that this action constituted an infringement of copyright. It was found that since the authors of the opinions were Judges and the fact that Hyperlaw did not copy the head notes or the numbering system which are added by West, Hyperlaw's actions did not constitute an infringement of copyright. In the absence of an exclusive licence to use copyright works, you cannot prevent another party using the works in a similar collation if the authors of the works consent to such use.

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Future Directions for Copyright in the Information Technology Industry Legislative Reform

The nature of copyright protection afforded to computer software often depends upon whether the definition of a "work" which has copyright protection includes software. There are some that argue that multimedia goods such as interactive CD-ROMs, which include video, music, text and other components, do not have copyright protection for the work as a whole, although the individual components are protected. This is because a multimedia product does not fall neatly into any definitions of "a work" under the *Copyright Act*. As is often the case, legislative reform is lagging far behind the pace of technological change and it is expected that amendments to the *Copyright Act* will be made in the near future. In the meantime practitioners must cover all bases in drafting documentation.

Duration of Copyright Protection

Many nations have now extended the duration of copyright protection from 50 years to 70 years. The period of copyright protection in Australia has not yet been altered. This twenty year difference may result in some interesting copyright issues and see a lack of capital investment as the copyright protection period runs out on some works.

Globalisation of Markets

With the trend towards reduction of trade barriers, copyright issues arising from issues such as parallel importation would be expected to decline, which will make the protection of intellectual property assets through exclusive worldwide licensing agreements even more important. Further, an intellectual property indemnity, which is requested from and by Intellectual Property Developers must be carefully considered to avoid the risk of an infringement suit. The increase of software patents both in Australia and the US and the cost of such litigation must be carefully considered.

Conclusion

The Research and Development costs and risks involved in ever increasingly complex software development coupled together with the relative ease that such software may be copied, places the majority of the burden of protection on the developer and distributor. Methods of minimising the opportunity for copyright infringement which keep pace with the advances in technology will always be a better alternative to relying on the Courts, which suffer from long delays, expense and an element of risk.

White SW Computer Law, August 1997.

Please note that this article is intended as a general guide only and should not be used in place of legal advice.