INDUSTRY STUMBLES ON COPYRIGHT

Tony Smith reports that software copyright has opened a Pandora's box of legal concerns about electronic information.

(This article appeared originally in the May/June 1983 issue of Australian Micro Computer Magazine and is reproduced here with the kind permission of the Editor of that publication.)

The recent National Symposium on Legal Protection of Computer Software turned into a splendid event for the Australian computer industry.

It gave the industry a level of prominence and concern far above the best it had ever been able to achieve for itself.

The symposium was very well managed by the sponsoring government departments: Attorney General's, Industry and Commerce and the Patents Office of Science and Technology.

It was organised for the government to obtain the views of interested parties following the decision of Justice Beaumont in the Apple versus Computer Edge case that computer software was not protected by copyright.

The night before proceedings were to get under way in earnest, the symposium was officially opened with a brief address from the Attorney General, Senator Gareth Evans.

He explained that it was in public interest to give creators and inventors protection so they had the incentive of financial return but, because copyright conveyed monopoly, special provisions were needed to ensure public access.

He concluded that the government would not bring down legislation before the Apple appeal was decided but that it might not await the outcome of the full legal process.

Master of ceremonies for the symposium Robin Bell of the Attorney General's Department opened the serious part of the proceedings with a restatement of direction and some points he had noted.

He said the computer industry in Australia had been fragmented until the software issue had led to groups talking to each other. He said it was easier for government if industry resolved its own disagreements.

The first cab off the rank, Australian Computer Society president Alan Coulter, said ACS represented a range of views. He succeeded in making many points which were forgotten for most of the day as the focus of the symposium narrowed, only to be reactivated later from diverse sources.

His consensus supported protection with a separate definition, the need for a thorough enquiry, and problems with interim provisions which become too hard to remove, a point he followed up with the suggestion of a "sunset clause" in any short-term legislation.

He raised the taxation and accounting implications of any uncertainty over software ownership, as well as concern for the speed of developments which could see software copyright extended to cover a representation of generally available knowledge contained in an heuristic program.

The previous day there had been a get-together of several industry bodies which, thanks to the engineering of Computer Power Pty Ltd's eminently acceptable joint managing director Brian Johnstone - and, much to the chagrin of Australian Computer Equipment Suppliers Association (ACESA) - appointed Karl Reed "spokesman for the computer industry", a position for which he has long strived.

That agreement led to Reed being slotted in for a minute to announce the points on which the industry had agreed: immediate legislation for protection, concern about awaiting the legal process, with an enquiry to follow.

A succession of industry organisations then occupied their allotted 10 minutes each with a statement of who they were, their support for the agreed position and details of the specific disasters that would befall their segment if their consensus was not heeded.

All slightly qualified their endorsement of the joint position, but it was left to the ACESA spokesman, ICL's Val Mickan, while trying to squeeze 50 per cent more words into 10 minutes than anyone else, to fire off a stinging attack on the lack of speed of government action since December.

That attack, which brought some solid rebuttals during the day, must be seen in the light of the ACESA secretariat having thought they had won the case in December. As professional lobbyists, they could be seen by their members as ineffective because the government has opened its ears to other points of view.

The first odd group to win the title of "industry" was the Australian Book Publishers Association, many of its members being keen to get into publishing educational software based on the clear misconception that copyright law would enable them to sell multiple copies of software as class sets.

An even less likely inclusion with "industry", the Australian Copyright Council, through its executive officer Peter Banki, at least provided some stimulus for tea-break conversation by raising issues for the implementation of software copyright which had not before seen light of day.

While he did not like polluting copyright with things mechanical, he saw opportunity for dual protection through both copyright and industrial property law.

Provision was required for library type abstract and indexing services, visual images on screens and the ownership of continuously updated databases.

Summing up the suppliers' views, Brian Johnstone said that it did not matter that legislation was difficult to enforce as it would at least be possible to take action over blatant copying. He said the software industry should not have to fund the free availability of educational software.

The first speaker of the "user" session who, without doubt, should have been included with the suppliers, self-styled president of the fledgling Australian Computer Retailers Association, Bernard Kirschner, took only a fraction of his

allotted time to declare "software is property". His parting line, conceding the need for laws defining man's relationship with information technology, underlined his style.

Macquarie University vice-chancellor Prof Edwin Wood, representing heads of tertiary institutions, was the first person to really set the cat among the pigeons when he declared opposition to any short-term action, wanting free movement of software within an institution. He compared execution of a program to reading a copyright book (hardly a breach), and expressed concern at any risk to the availability of "common heritage of progammers" - the coding techniques developed over many years and embedded in countless programs.

A libraries spokesman raised issues of public access to information in a democratic society and libraries' right to loan via retransmission of encoded works, suggesting that creation of an electronic copy should not be reasonable grounds for beach of copyright.

A member of an Australian Education Council working party went to much trouble to disassociate his views from the unformed ones of that council before concluding that computers were making an important contribution to learning while funding constraints made it impossible to divert money from other "essential" needs. He said schools urgently required clarification of the situation, the right to modify and adapt software and to be treated at least as leniently as domestic users without suffering onerous administrative procedures.

Bruce Taylor, as alternate spokesman for Software Liberation, restated arguments that had had extensive coverage before the symposium. He took pains to limit his organisation's interest to the area of packaged microcomputer software, leaving the bulk of the longer established industry still covered by enforceable contracts and licensing agreements.

The Australian Federation of Consumer Organisations said that the real purpose of copyright was to facilitate public access to copyright materials, that almost all people using copies would do without rather than pay for the originals, and that cheaper software must stimulate hardware sales.

After lunch, three lawyers were given the task of espousing the options open for legislative and international action.

The first (pro-copyright) lawyer proceeded to make a number of errors of fact about the nature of computer software which lost much of his audience, some for most of the session. He emphasised that copyright law does not have the appropriate right-of-use provisions and said any shortening of the term of protection would need to be done outside copyright law to avoid breach of international agreements.

Discussion on international issues concentrated on seeing how many of the delegates could be convinced to come back to Canberra in April for a seminar on international developments on the legal protection of computer software, to be held in conjuction with a long scheduled World Intellectual Property Organisation technical meeting.

The final session consisted of a virtual panel of five "judges" backed up by a jury of 250 confirming that the points made by the industry had not stood up to scruitiny and thus the likelihood of precipitous legislation was considerably diminished. It started with a statement from panel chairman Bell that the Attorney General's Department was most unhappy with ACESAS's early criticism of the supposed lack of speed.

Roger Clarke, a practitioner recently turned academic, emphasised his disappointment at the lack of long-term suggestions from the industry. He gave examples of compiled chips and non-human authors as part of a stream of challenges to be addressed. He raised the question of whether the about-to-be-chosen Management Investment Companies, or the board responsible for them, could allow investments in software companies while the status of software as property remained unclear. He said that Software Liberation's position was being fraudulently represented as revolutionary when all it was doing was proposing moving the software industry from one well-established economic modus operandi to another equally accepted for appropriate industries.

David Walsh, who came to be referred to as the panel's token lawyer, had the important distinction of being the only person on both the government's advisory committees on copyright and on industrial property. When Walsh said that the industry had not convinced him of any urgency and that there were some disadvantages to immediate action, the writing was on the wall fo the debate. For the first time, it was clear that government and its independent experts would have to be convinced by reasoned argument, and would not be moved by pressure alone.

Brian Johnstone waited until well into the session to fire the final shot for immediate legislation, explaining that the computerists could no more come to terms with legal technicalities than the lawyers could with computers. He pleaded for a climate of confidence in which software developers could go about their business without fear. That psychological point was immediately recognised as being just as important as the legal and so far unsubstantiated economic arguments, but by then the consensus was that any such problems could be handled by a strong dose of government policy pronouncements without any need to accelerate a thorough legislative program.

Karl Reed, freed for a while from being spokesman for the industry, announced that his Software Industry Committee had long been advocating public funding of educational software. He put in an informal application to join a task force investigating protection mechanisms rather than having to produce yet another unrewarded submission to an enquiry.

As expected, Albert Langer got the most words in without resorting to any points not raised on previous occasions, but gradually a few more people actually listened.

A couple of organisations which had not been included on the program were given an opportunity to speak. That pushed the already teetering supplier cause over the brink.

Everyone interested already knew that the Australian Council of Social Service's member organisations had a pressing economic need for affordable software, but were flattened when the council offered to get together with consumer groups to mount effective political action for the cause of developing the Australian industry - an offer to which only token resistance could be offered.

The spokesman for the other omitted group, IBM mainframe users hiding under that extraordinary name Australasian Share Guide, effectively conceded defeat for the ACESA position with an outburst of abuse directed against the social service organisation and anyone else he perceived as not representing his favorite supplier. That, of course, came straight up against international convention requirements, making it obvious that satisfactory short-term legislation would take about as long to draft as anything that might replace it.

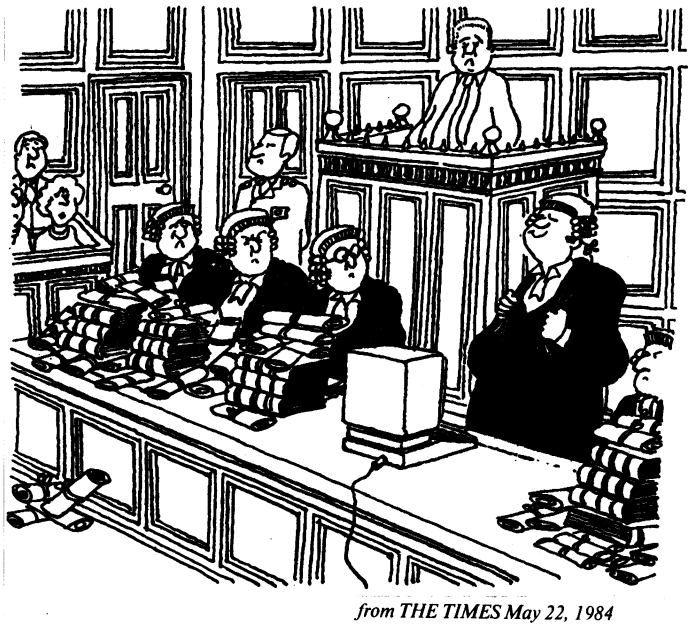
Even the proposed sunset clause then ran into trouble. A member of the NSW Society for Computers and the Law suggested that any protection period under sunset legislation would have to be kept to two or three years so that recipients of the protection could not be in a position to claim that subsequent legislation was depriving them of pre-existing rights.

The lawyers then went to town, decreeing neither copyright nor patent to be appropriate and demanding that protection be part of a new coherent information law, with other legal and social implications fully examined.

Despite a brief flurry of concern for perceived dangers to Computer Power's new offset software contracts, the symposium suddenly became a forum for a pleasant return to centre stage by retired copyright regulators. One of them suggested that, by developing legislation from scratch, Australia would be in a strong position to influence the shape of international agreements.

In their summing up, the panel's references to short-term protection no longer assumed the copyright mechanism, and they got on with emphasising the lack of industry forward planning, the need for the industry to explain itself properly, and the need for further community involvement.

Langer, seeming only to address his supporters, talked of triumph and the need to beware of a massive rear-guard action from large and powerful foes. But, master tactician that he is, maybe he was challenging ACESA secretariat to come in heavy, knowing that such a move was the last thing the rest of the industry wanted and would fail.



from THE TIMES May 22, 1984

BEHIND OUR BACKS — Computer Software Copyright

Reproduced below is the paper by Albert Langer of Software Liberation, presented at the National Symposium on Legal Protection of Computer Software, which was held in Canberra on 15 and 16 March 1984.

"We'd have had solar power long ago, if only multinational companies could put a blanket around the sun and sell holes in it."

Copyright law puts an artificial legal blanket around computer information and confers a monopoly right to sell holes in that blanket. Production of software is financed by users paying for the right to use it.

Alternatively, software could be treated like scientific research, road building and other "public goods" and infrastructure projects.

Most people don't use computers and wouldn't know whether copyright matters. But the fundamental issue will affect us all:

There are two major options . . . First, and most likely, information networks will be centralised, oligopolist and limited — essentially means of preserving existing power structures, and controlled by the same people who own newspapers, television networks and radio stations. Second, and much preferable, information networks will be regarded as a public utility, open to all who can pay an appropriate low-cost fee for data . . . a consumer organisation could have the same access to information as a tyre manufacture, trades unions as employers, an opposition party as a government, backbenchers as parliamentary ministers, pacifists as the military, media users as media proprietors . . .

Right now, the Attorney-General's Department is deciding that issue, by drafting urgent, short term copyright legislation to be introduced within a few weeks. This follows confidential submissions just before Christmas, from an organization of multi-national computer companies, the "Australian Computer Equipment Suppliers Association" (which has no Australian members). It is being hurried along by empty threats that US companies will "boycott" Australia and deny access to the latest software, and by hypocritical claims that no Australian software industry could develop without copyright protection. US inspired opposition to an inquiry before legislating has become quite hysterical.

Retrospective legislation has been threatened, so that the many schools and others with cheap "compatible" computers could be forced to abandon them, and also to destroy their existing large collections of unlicensed software. No decision to "privatise" or destroy a large slab of public property has ever before been taken so casually.

Politics lives in a crisis atmosphere. Short-term, urgent considerations inevitably receive more attention than long-term important ones . . . Technology develops its own momentum and can be used as an instrument of the strong