

- <<http://www.news.com/News/Item/0,4,12201,00.html>> (25/7/97).
- 24 'About GATEKEEPER' <<http://www.ogit.gov.au/gatekeeper/aboutgatekeeper.html>> (15/6/98)
- 25 For example, Canada (Quebec and Ontario), Sweden, the United Kingdom, Switzerland, the Netherlands and Ireland have all taken this approach. See 'Privacy Protections Models for the Private Sector' <http://www.ipc.on.ca/web_site.eng/matters/sun_pap/papers/models-e.htm> (27/10/97).
- 26 *Privacy Act 1988* s.14 IPP No.4(1).
- 27 'The Wallis Report' <<http://www.law.usyd.edu.au/~alant/wallis-report.html>> (22/5/98)
- 28 Batalla E, 'Legal aspects of computer programs security in Spain', (1996) 28 *Comp & L* 28, at 28.
- 29 In English the *Organic Law of the Protection of Computerised Personal Data*. See above n.28, at 28.
- 30 Above n.28, at 30.
- 31 *Ibid*.
- 32 Kaminky M, 'Getting Up to Speed on Net Law', (1996) *ABA J* (June) 90, at 90.
- 33 In Australia there is clear legislation in the form of the *Service Execution and Process Act 1992 (Cth)*, as well cross-vesting legislation and various state judicial rules which deal with the application of laws in international situations involving tort and contract.
- 34 'Agreement on Interterritorial Data Protection' <<http://www.datenschutz-berlin.de/sonstige/konferen/ottawa/alex1.htm>> (27/10/97).
- 35 *Ibid*.
- 36 See *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847
- 37 In *Donoghue v Stevenson* [1932] AC 562 and *Jaensch v Coffey* (1984) 155 CLR 549 the bases for recognising a duty of care were enunciated under the "neighbour" principle. Where there was proximity between parties and a level of reliance between them then a duty of care owed by one to the other would be recognised. In the context of encryption, there is arguably a proximate relationship between the encryption expert and data storer. There is also clearly reliance by the data owner on the encryption expert and data storer performing their work adequately.
- 38 Under negligence law, a person holding themselves out as a specialist is required to perform their occupation with the skill and diligence of a similarly skilled person in the circumstances: *Voli v Inglewood Shire Council* (1963) 110 CLR 74. This would presumably be wide enough to cover parties holding themselves out as encryption specialists.
- 39 See above n.33.
- 40 Ricketson S, *Intellectual Property: Cases, Materials and Commentary* (Sydney: Butterworths, 1994), ch 3.
- 41 [1978] Qd R 72.
- 42 (1989) 18 IPR 63.
- 43 McGinnes P, 'The Internet and privacy - some issues facing the private sector' (1996) 29 *Comp & L* 25, at 26.
- 44 *Ibid*.
- 45 Greenleaf G, 'Europe '92 - Implications of the European Commission Draft Directive on Data Protection in Australia' (1991) *NSW Society for Computers and the Law Yearbook* 207, at 210.
- 46 [1937] 2 KB 242.
- 47 See *Crimes Act 1900 (NSW)* s.94], *Croton v R* (1967) 117 CLR 326, *Davies* [1970] VR 27 and *Rose v Matt* [1951] 1 KB 142
- 48 See *Smith v Desmond* (1965) AC 960 and *Kennison v Daire* (1986) 60 ALJR 249. Although the cases do not deal with encryption specifically, they do show the criminal law's approach to larceny - namely that the diligence of a custodian is irrelevant to the larceny offence.
- 49 'Data protection' <<http://www.bundesregierung.de/ausland/system/sys60.html>> (27/10/97).
- 50 See above n.19.
- 51 'Cryptography - The Current Policy Debate' *Comput Law Newsletter* Vol 4, No 1 p.2, at 2.
- 52 Hughes H and Cosgrave D, 'The Internet - legal questions' (1995) *L Inst J* (April) 326, at 326.
- 53 Above n.45, at 207.
- 54 'Joint DPI/Columbia Roundtable' <<http://www.un.org/plweb/cgi/idoc...+un+un+pr1997+pr1997++encryption>> (22/6/98)
- 55 'DPI/NGO Conference Considers New Communication Technologies' <http://www.un.org/plweb/cgi/idoc.pl?4271+...ser_+www.un.org.80+un+un+pr+pr++internet> (29/10/97).

Casenote—Flyde Microsystems Limited v Radio Systems Ltd (Laddie J 11 February 1998)

John Lambert, Barrister, Lanastter Buildings Manchester, UK

In this case Laddie J had to construe section 10 (1) of the *Copyright, Designs and Patents Act 1988*. The sub-section defines "a work of joint ownership" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors."

Facts

The defendant had asked the plaintiff to develop and supply printed circuit boards ("PCBs") for a sophisticated mobile radio system capable of tuning to a frequency in response to a signal from a base station known as "trunked radio". The main component of the PCBs was an EPROM chip loaded with special software. That software was written by the plaintiff, but the defendant had been in close contact

with the plaintiff during its development. The plaintiff did not charge for developing the software but made a handsome return on the sale of PCBs to the defendant. Initially it supplied PCBs fitted with the EPROM chips to the defendant, but the parties found it convenient for the defendant to install the software onto blank chips and fit those chips to the plaintiff's PCBs at its premises. Over the years the plaintiff did more than £3 million worth of business with the defendant. Things went wrong only when the defendant began to buy PCBs elsewhere to which it fitted EPROM chips loaded with the software. The defendant claimed to be entitled to do that on the grounds that it was a joint owner of the copyright subsisting in the software

and that it had a free licence to make such use of the software. The plaintiff disputed that claim and contended that it was the exclusive proprietor of the copyright. The parties were unable to come to terms: the plaintiff sued the defendant, and the defendant counterclaimed against the plaintiff, for infringement of copyright.

The Preliminary Issues

The parties had agreed that two questions should be tried as preliminary issues:

- whether the copyright in the software belonged to the plaintiff alone or to the plaintiff and defendant jointly; and

- whether the defendant had an implied licence to do the acts of which the plaintiff complained.

Held

The learned judge found for the plaintiff on both issues.

Joint Ownership

On the first issue, he observed that section 10 (1) does not turn someone who is not an author into an author but categorizes works that are made from the input of two or more authors. In relation to authorship two matters have to be addressed:

- it is necessary to determine whether the putative author has contributed the right kind of labour; and
- if it has, it is necessary to decide whether its contribution was big enough.

The approach is similar to the exercise to determine whether a defendant has infringed copyright by copying a substantial part of the copyright work. It was common ground that there had been close co-operation between the parties over 5 years and that the defendant had saved the defendant considerable time by testing the software but that was not necessarily enough. Beta testing does not make the user an author of a program and proof reading does not make the printer an author of a book. What counted was whether the defendant had contributed authorship skill. The defendant had put effort into error fixing and reporting faults and bugs. It had

made a functional contribution by way of setting the specification for what the software was to do. It suggested causes of some of the faults in the software though it did not produce solutions to them. It had provided technical information concerning the hardware. It set parameters and timings within the software. Valuable and time consuming though such contributions must have been they did not contribute to the authoring. The defendant's claim to joint ownership on the grounds of joint authorship therefore failed and with it the counterclaim.

Implied Licence

The defendant claimed an implied licence on the following grounds:

- it had contributed considerable effort, time and money to the development of the software which it would never have invested had it known that it would not be entitled to use the software as it did without recourse to the plaintiff;
- sales by the plaintiff of the software manifested an understanding that each party would be free to exploit the software; and
- the defendant used PCBs sourced from a third party to replace defective ones that had been supplied by the plaintiff.

Laddie J disposed of the second plea immediately on the ground that it was unsupported by the evidence. He found the first to be inconsistent with

the evidence and improbable that the parties would have intended the defendant to be free to deal with the software as it wished after the plaintiff had spent 4 years on its development without payment. As for the third, there was no evidence that the plaintiff had supplied a defective PCB but if it had the defendant already had a remedy under the *Sale of Goods Act 1979* without having to copy the plaintiff's software.

Comment

This scenario occurs very frequently and the plea of joint ownership on the grounds of joint development is often raised. This decision should not be paid to such defences. On the other hand, it is understandable that a customer who has paid for, or helped to develop, a product should believe that it ought to have some interest in it. Sometimes an "informal partnership" that comes into existence as a result of a joint venture between the parties acquires the copyrights as a partnership asset as was the case in *IBCOS Computers Ltd. v Barclays Mercantile Highland Finance Ltd.*¹. Sometimes equity imposes a constructive trust in favour of the customer on the grounds that he has commissioned the work as happened in *John Richardson Computers Ltd. v Flanders.*² Of course, the only sure way in which a customer can reserve the right to use a work that he has helped to develop or for which he has paid is to negotiate a contract.

¹ [1994] FSR 275, 294

² [1993] FSR 497.

