SHRINKWRAP LICENCES: THE NEW ZEALAND POSITION

• *by Craig Sinclair*

Background

"Shrinkwrap", "boxtop" or "tear–open" licences originated in the US due to the economic needs of mass marketers of computer software.

The shrinkwrap licence is a printed document on the inside of packaged software, usually in plastic shrinkwrap containers, which is visible from the outside and which states that the customer consents to the terms of the licence agreement by tearing open the package. Use of the licence is restricted to relatively cheap mass marketed software where it is impractical for the software publisher to negotiate and sign individual licences. Essentially it was introduced to combat piracy in cases where copyright proceedings were thought to be ineffective, particularly against counterfeiters, user groups and computer clubs, software rental companies, individuals swapping software amongst themselves and corporations with multiple CPUs. A secondary objective was to limit liability for defects in the software.

It is doubtful, however, whether shrinkwrap licences are effective against piracy. Even if such licences are upheld as legally enforceable, there seems little reason why they should be any more effective than copyright protection – i.e. if counterfeiters and others are to ignore copyright then they will probably ignore contractual terms as well.

The two most significant clauses in the shrinkwrap licence are the shrinkwrap clause and the licensing clause – i.e. retention of title. MicroPro International uses the following shrinkwrap clause for its Word Star program:

> "Opening this package indicates that you accept this agreement and will abide by it. If you don't agree with what it says promptly return the package unopened and your money will be refunded."

In terms of retention of title, the software proprietor purports to retain title and then grants a licence. Ashton–Tate has the following clause for their dBase II software:

> "You acknowledge that the materials are the sole and exclusive property of Ashton–Tate. By accepting this licence you have the right to use the materials as outlined and limited by this agreement."

It is common under the retention of title clause to prohibit copying, decompiling, transfer, rental, sale or assignment and the use of the software by any other person on more than one CPU.

In the United States, legislation has been introduced in Louisiana and Illinois which validates shrinkwrap licences provided certain requirements are adhered to, particularly that the notice that constitutes acceptance of the terms is clear and unambiguous and that the contract is written in plain english.

Is there a contract under New Zealand [or Australian] Law?

It is questionable whether a shrinkwrap licence would constitute a valid contract in New Zealand [or Australia].

Is there an offer by the software publisher, and has it been accepted by the user?

From the software publisher's point of view, the publisher offers the supply of the product in terms of the licence and the user signifies acceptance by tearing open the package. An offer must, however, be communicated to the user if it is to be effective. It would therefore be necessary to show that the user read and understood the terms of the licence prior to opening the package. In practice, it may be that an enthusiastic user pays no attention to the not–so–fine print in his haste to open and try his newly acquired software package.

Is there consideration between the software publisher and the user?

Consideration from the software publisher will be the granting of permission to use the software in terms of the licence. Consideration from the user is his agreement to adhere to the terms of the licence.

What is the role of the retailer?

The retailer selling a large number of mass–marketed software products will not usually be the agent of the software publisher. Accordingly, the user may consider that when he hands over his money to the retailer he is purchasing the software from the retailer and receiving outright title whereas the retailer believes the user has accepted the licence. In such circumstances practical difficulties arise, because if the software is defective the retailer may not be obliged to replace or refund the package and the user will have no remedy in contract against the software supplier as he has not in fact accepted the licence.

Fair Trading Act 1986

In addition to the arguments in contract law relating to privity of contract, offer, acceptance and consideration, if the shrinkwrap licence is not clearly displayed on the package and the software publisher attempts to sue for breach of the licence then s9 of the *Fair Trading Act* 1986 (NZ) could be invoked by the user for misleading or deceptive conduct. Alternatively, if the user has purchased from the retailer without noticing the licence and the retailer refuses to replace or refund if the software is defective, the retailer may be liable under s9 of the Act for failing to explain the effect of the licence.

Should Shrinkwrap Licences be Enforceable?

Now that copyright protection for computer software has been confirmed in the High Court (*IBM v Computer Imports Limited* unreported CP494/86, 21 March 1989, Auckland) the application of shrinkwrap licences may be less critical than in the past. The software publisher may nevertheless have other interests which he wishes to protect by the use of the licence such as the limitation of liability. However, consumers also have the right not to have unilateral contracts imposed upon them unless the terms of such contracts are clearly understood and accepted at the time the contract is to take effect.

Thus, whether or not a shrinkwrap licence can be enforced will depend on the facts in each case. The circumstances the Court will be likely to take into account include:

- Whether the shrinkwrap provision is boldly printed on the outside of the package and whether special attention is drawn to its limitation provisions.

- Whether the contract is written in plain english and therefore comprehensible to a user who may not necessarily

be expecting to enter into a contract when purchasing the software from the retailer.

- Whether software publishers had advised the retailer to bring the existence of the licence to the attention of the user and whether any materials published in association with the software draw attention to the licence.

- Whether the user had the opportunity to test the software prior to acquisition at the retailer's premises.

All of the above create an awareness on behalf of the user as to the nature of the transaction he or she is entering into and the capabilities of the software he or she is acquiring, so that future disputes can be avoided.

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THE IMPLEMENTATION OF A COMPUTERISED LITIGATION SUPPORT PILOT STUDY

- *by Ian Adrian and Elizabeth Broderick*

Blake Dawson Waldron has successfully pioneered the use of both free text and data processing systems in litigation. In the last few years the firm has designed and implemented case specific systems to organise more efficiently and cost effectively the large volume of information dealt with in complex commercial litigation proceedings. The majority of cases have had in excess of 1,000 documents and 1,000 pages of transcript with some cases having had as many as 60,000 documents. The relevant information and documents have been able to be retrieved quickly and accurately. With the assistance of the computer, lawyers working on the cases have been able to organise the relevant information at a much earlier stage than is usually practical. The result has been that trends which were not possible to discern because of the mass of information have become apparent well before the hearing.

At the hearing, the client's case is effectively and efficiently presented by the use of:

(a) text processing systems to search the pleadings and the transcript for key issues; and

(b) document control systems to retrieve document abstracts for cross examination and to assist in locating relevant documents.

The Commonwealth Reporting Service is now providing transcript on disk which is assisting the firm in the construction of transcript data bases.

Blake Dawson Waldron has also investigated and designed general data processing systems to provide background support in large trade practices actions.

This has resulted in enhancing the quality of our client's submissions.

The firm is now implementing a formalised approach to litigation support, particularly in the area of document control. The firm believes that it is