

Maximising Legal Protection of Packaged Software

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Introduction

This paper will consider the following matters:

1. the shrinkwrap licence - operation and enforceability;
2. the scope and limitations of the *Copyright Act*, 1968 (the '*Copyright Act*') in protecting packaged software;
3. the suitability of existing copyright law for computer program protection and other regimes available, in particular: patent law, trade mark law and confidentiality; and
4. the preventative measures available to packaged software suppliers for the protection of computer programs.

The shrinkwrap licence

A shrinkwrap licence is a software licence which may be either printed on the exterior of, or contained within, the packaging of mass-produced software. The term 'shrinkwrap' refers to the final layer of plastic which cocoons the cardboard packaging and seals the product. Heat technology is used to shrink the plastic to a snug fit around the product.

A shrinkwrap licence sets out the terms and conditions for use of the software by the user. It is intended to be just what it is called, that is, 'a licence' with the intention that the user will be bound by the terms and conditions and that they will delimit the users permitted scope use of the software. The traditional

theory has been that upon breaking the shrinkwrap seal the end user adopts the terms of the licence. However, there are significant legal issues which confront any would-be shrinkwrap licensor.

The first of these problems is one of general contract law and the incorporation of terms into a contract between parties. The issue is whether reasonable notice of the terms of the licence have been brought to the attention of the user prior to the conclusion of the transaction. Terms cannot be imposed unilaterally following the conclusion of an agreement as they do not form part of the subject matter in respect of which there has been a meeting of minds and due consideration has passed.

A licensor may seek to bring the terms of the licence to the attention of the user by printing the terms of the licence on the exterior of the packaging. Whether this will constitute sufficient notice will always depend on the reasonableness of the particular circumstances.

A licensor may prefer that the licence terms and conditions are contained within the sealed package, rather than appearing on the exterior. In these circumstances the licence would not come to the attention of the user until the user opens the package, which will often be some time after payment has been made and the user has taken delivery of the software (and long since left the store). In an attempt to overcome this problem, the licence may provide that the user may refuse to accept the licence by refraining from opening the remaining sealed

packages within the box which contain the user information and disks, and returning the product to the point of purchase for a refund.

The problem is illustrated in the US case, *Step-saver Data Systems Inc v Wyse Technology and the Software Link Inc* (939 F2d 91 [1991]). The Plaintiff ordered software by telephone from the defendant followed by a confirmation of the order in writing. The defendant then supplied the software with an invoice. During this process, no mention was made of the shrinkwrap licence.

At first instance it was held that the shrinkwrap licence was enforceable but this finding was overturned on appeal on the grounds that the contract had been completed before the goods were received and the terms of the licence were not incorporated into the transaction.

Irrespective of whether the licence appears on the exterior of the package or inside, the licence may not be effective because of the intervention of a third party (eg a distributor), giving rise to a privity issue.

There will be no privity of contract between the copyright owner/licensor and end user where there is an intervening third party, unless that third party is the agent of the owner/licensor.

Distributorship agreements often specifically provide that the distributor is not the agent of the owner/licensor. However, even if the agreement were to state otherwise, it would still be a matter of fact whether an agency relationship in fact exists.

Even if the distributor is the agent of the owner/licensor it is likely that the user will not be informed of this fact at the time of payment, in which case the owner will be an 'undisclosed principal', giving rise to privity between the user and the undisclosed principal.

If the view is taken that the shrinkwrap licence is enforceable, the owner/licensor may want to rely on the limitation of liability provisions contained in section 68A of the *Trade Practices Act, 1974* (the 'TPA'). In particular, where the contract for the supply of computer software does not amount to the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, liability may be limited to one or more of the following:

- (a) in the case of goods:
 - (i) replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring the equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired; and
- (b) in the case of services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.

The limitation will not be effective if the person to whom the goods or services were supplied is able to establish that it is not fair or reasonable for the supplier to rely on that term of the contract.

It is unsettled whether software constitutes goods or services under the

TPA. In the view of the authors, either characterisation will provide adequate scope for the operation of section 68A of the TPA.

Of course a supplier cannot exclude those conditions and warranties implied into all contracts of the supply of goods or services to a consumer under Division 2 of Part V of the TPA. A person is taken to have acquired goods as a consumer if the price of the goods does not exceed \$40,000, or where the price of the goods exceeds \$40,000 the goods are of a kind ordinarily acquired for personal, domestic or household use

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or consumption. In addition, a person is taken not to have acquired goods as a consumer if they acquired them or held themselves out as acquiring them for the purpose of resupply, or using them up, or transforming them in trade or commerce in the course of a process of manufacture. It is interesting that many American style licences continue to seek to limit the liability of suppliers contrary to the operation of Division 2 of Part V, of the TPA. The effect of the inclusion of such clauses is of course that they will be void and unenforceable. In addition, these corporations may be breaching section 53 of the TPA in that they may mislead consumers as to their rights and remedies under the TPA.

Even if a shrinkwrap licence is found to be unenforceable it may provide the software supplier with certain advantages. For example, in relation to the rental or transfer of the software: neither rental nor sale of non-pirate non-grey software is prohibited by the *Copyright Act*. A supplier may therefore rely on the terms of its shrinkwrap licence to prohibit rental and transfer of the software by the user. If the shrinkwrap licence is unenforceable the supplier may argue that when an end user runs a copy of a computer program on their computer this involves a reproduction of the software within the meaning of the *Copyright Act*. Executing software on a PC almost invariably involves what is technically a reproduction in RAM (Random Access Memory, which provides a work space for the computer) and therefore prima facie an infringement of copyright. At first instance in the Autodesk case *Northrop J* indicated that use may constitute a reproduction although there is an indication to the contrary by Sheppard J in the decision of the Full Federal Court. The High Court has not ruled on the issue. The end user who has purchased a copy of the software has an implied licence to reproduce the software by running it on their computer. It is arguable that this implied licence only applies in favour of the purchaser of a legitimate copy of the software. Therefore, any other person (eg a person who rents a copy of the software) will by their use infringe the copyright. Even if the implied licence were held to extend prima facie to a person who rents a copy of the software, in our view, such an implied licence could be negated by express wording drawn to the attention of the user/purchaser in an appropriate manner (eg by notice on the package on the diskettes or on the screen).

In this way, because of the nature of software and the way in which it is commercialised, a shrinkwrap licence, even if unenforceable, may be relevant in the interpretation of the intention of the supplier and the scope of any implied licence.

An additional area where a shrinkwrap licence may assist is in relation to the use of software on networks. For example, in an MS DOS or OS/2 operating environment a copy of the software is made by each user who executes the software from their terminal. This is because each user executes in a separate area of RAM (as MS DOS and OS/2 are multi user operating systems). Nor would it matter if the terminal was dumb or intelligent. The only difference between a dumb and an intelligent terminal in this context is the location of the RAM and processor performing the work for the user of the terminal. In the case of a PC it will be in an immediately adjacent box and in the case of a dumb terminal the box may be a little further away. The legal analysis does not alter because in both cases a substantial copy of the software is being made each time the program is invoked by a user. Here, the shrinkwrap licence even if unenforceable will again operate to give definition to the extent of any implied licence and may for example provide evidence of an intention to allow a user to download software onto a work station from a server for a limited number of concurrent users.

There may be an issue as to whether the purchase of software in a shrinkwrap pack involves a transfer of any interest in the copyright subsisting in the software as opposed to the physical floppy disks and manuals. There is no doubt that under the sale agreement title in the product being purchased will pass, under the general principles of contract law.

In our view, the better view is that the only interest that the user obtains in the intellectual property subsisting in the computer software is an implied licence to use the software (which because of the nature of software as described above) would give rise to an implied licence to make a reproduction. A purchaser cannot claim greater rights than those which are granted expressly by the intellectual property rights owner.

In order to maximise the probability that the shrinkwrap licence will

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be enforceable it is necessary to draw to the attention of the user the existence of the licence and its terms prior to completion of the supply transaction. It is arguable, that given that the shrinkwrap device has now been on the market for some considerable time, as a standard form of commercialising software, suppliers may be able to mount an argument that the previous course of dealings in the market place should give rise to a reasonable level of notice on the part of end users. Even if the shrinkwrap licence is unenforceable, in our view it would provide good evidence of the intended scope of any implied licence which may be

said to run with a supply of the product to end users. This can be of great assistance in relation to controlling rental and transfer of the software and also in relation to use of the software on networks.

Scope and limitations of protection under the Copyright Act

The examples provided above in relation to the issues of rental and transfer of software and the use of software on networks gives rise to a very important question namely whether it is necessary to licence software at all in order to gain maximum protection for the owner. Some argue that it is sufficient to rely on the provisions of the *Copyright Act* and completely dispose of any argument based on contract (either expressed or implied).

The advent of the new technology has always proved a challenge for the law and computer software has not been an exception to this rule.

Following the decision in the case of *Apple Computer Inc -v- Computer Edge Pty Ltd* (1983) 50 ALR 581 (which denied copyright protection to object code) there was a strong demand from industry for legislative protection to be given to computer software.

The response of the legislature in 1984 was to amend the *Copyright Act* by:

1. specifically including computer programs, within the concept of a 'literary work'.
2. introducing the definition of computer program as follows:

'an expression, in any language, code or notation, of a set of instructions (whether with or without related information) in-

tended, either directly or after either or both of the following:

- (a) a conversion to another language, code or notation;
- (b) reproduction in a different material form,

to cause a device having digital information processing capabilities to perform a particular function;

3. amending the term 'adaptation' to mean:

'a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work'; and

4. amending the definition of 'material form' to provide:

'any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work or adaptation can be reproduced'.

This response was originally intended to be a temporary measure until further consideration could be given to the matter. At present the Copyright Law Review Committee is considering the question of the adequacy and appropriateness of the protection granted under the *Copyright Act* in relation to computer programs and works stored in computer memory. The findings and recommendations of the Committee are awaited with great interest by both the legal profession and industry.

The most recent test of the efficacy of these provisions and consideration of the protection granted by the *Copyright Act* to computer programs is the *Autodesk* case. [The facts of this case are set out in J. Burnside QC's article beginning on page 1 of this Journal - *Eds*]

Ramifications of the decision for copyright protection of computer software

One of the particularly interesting and controversial facts arising from this case is that the court was of the opinion that there had been an infringement of the copyright in the computer program because of the reproduction of the 'look-up' table in the infringing work even though it was recognised that the look-up table itself was not a computer pro-

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gram. This suggests that by the inclusion of mere 'data' within a program, which data would need to be reproduced in any other computer program if it were to achieve the same result, will provide a 'de-facto' form of protection for the computer program itself. Therefore in appropriate circumstances it may be possible to maximise protection by incorporating similar bits of code within software.

In relation to the scope of protection, the ambit of protection granted by the *Copyright Act* although considered in the *Autodesk* cases has yet to be clearly defined. For instance, the issue of whether mere use of a computer program will constitute a reproduction (as is the contention

of the authors) remains to be explicitly considered.

It is difficult to resist the conclusion that the *Autodesk* case represents an example of a party obtaining a commercial advantage from the efforts of another party and that the decision which is ultimately being reached by the Court is in some form value judgment. However, the fact that the dispute required the consideration of three separate tribunals is nothing if not a testament to the factual complexity of the case. In the view of the authors the *Autodesk* saga is very persuasive evidence that in order to succeed in such a dispute it is essential to demystify the technology and to present the Court with a concise, simple and streamlined description of the subject technology. It is also perhaps an indication of the value that an independent expert assisting the bench might be able to add in such a situation. The *Autodesk* decision is not evidence that copyright law is incapable of providing a regime which can assist in the resolution of such disputes. It is however, strong evidence of the importance of reducing the facts of such dispute to a readily digestible and accessible form so that the settled principles of copyright law can be sensibly applied.

Arguments have been put that given the peculiarity of computer software sui generis protection should be provided. This argument has now largely been abandoned, and with good cause. The very significant international conventions surrounding copyright law should not be underestimated. If Australia as the 'clever country' wishes to export and import technology and participate in the information industry generally it is essential to demonstrate not only that we are able to provide a secure structure for foreign invest-

ment in this country but that the reciprocal benefits will apply to our own nationals seeking to export their labour.

Suitability of existing laws for computer protection - alternatives to copyright

There are limitations on the scope of protection afforded to computer programs by the *Copyright Act*.

The main limitation is that, as reaffirmed by the High Court in the *Autodesk* case, copyright only protects the particular expression of an idea and not the idea itself. In relation to computer programs this means that another person is free to independently write a computer program which performs the same functions and thereby capitalise on the ideas of someone else.

However, given the ease with which programs may be copied, the greater evil generally will not be that someone else will steal an idea by the independent creation of a functionally similar program, but rather that they will copy the work.

Given the utilitarian nature of software (ie its function is the relevant feature), it is arguable that copyright is not a suitable form of protection. In addition the term of protection granted under copyright law, life of the author plus 50 years - is undeniably too long as most computer programs will be superseded within a couple of years.

These issues under the copyright law regime, mean that it is worthwhile to consider alternative forms of protection. We will consider briefly the protection available for computer software under patent law, trade mark law and the law of confidentiality:

Patent

Given the functional nature of a computer program, it would seem at least theoretically that letters patent may provide a suitable vehicle for protection.

Traditionally the Patents Office has refused to grant patents for computer programs as the claims made in respect of computer programs will often include a method of calculation or a scheme, or rule or method for performing a mental act.

However, in March 1986, following the decisions in several American cases, the Australian Patents Office issued Guidelines for Con-

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sidering the Patentability of Computer Program Related Inventions. According to these Guidelines, although some subject matter is per se inherently unpatentable, a claim which includes a feature of such subject matter will not necessarily also be unpatentable. The claim is to be judged as a whole.

Whilst maintaining that claims to programs per se should continue to be refused, the Patents Office guidelines stated that assessment is to be based on a two-part test. This two-part test is known as the 'Freeman Test'. This test was developed in several US cases and was established in the case of *In re Freeman* (1978) 197 USPQ 464.

The Freeman test involves the making of a two step assessment of a

claim by:

1. Deciding if the claim includes subject matter which is inherently unpatentable such as a mathematical algorithm; and
2. If so, determining the relationship between this unpatentable subject matter and the claim as a whole.

If the decision based on this analysis is that the claim as a whole is or inherently unpatentable subject matter then it is to be refused, but, if instead the claim is in respect of an application of that subject matter, the Patent will not be barred.

Furthermore, the Guidelines state that apparatus claims being claims to a computer when programmed are to be treated in the same way as method/process claims. However, there is no reason for regarding other types of apparatus claims in relation to computers capable of being programmed characterised solely by the program itself as novel.

Judicial consideration has recently been given to this test of patentability in the case of *International Business Machines v. Commissioner of Patents* (1992) 22 IPR 417. This case involved an appeal against a decision of the Commissioner of Patents to refuse to accept an application for letters patent. The invention for which the patent was claimed related to 'computer graphics and more specifically to a method and apparatus for generating curves on computer graphics displays'. The application was refused by the Commissioner on the basis that the claim was for a pure algorithm and as much, was unpatentable. A mathematical algorithm is a procedure for solving, given a type of mathematical problem.

The Commissioner objected to claim made in the specification because it

did not define a 'manner of manufacture' but rather recited a mathematical algorithm which it then wholly pre-empted. Burchett J noted that 'the notion that a claim which recites and wholly pre-empts such an algorithm will be bad derived from the United States decision in *Re Freeman*'. His Honour then referred to several US decisions including the case of *Parker, Acting Commissioner of Patents and Trade Marks v. Flook* 198 USPQ 193 (1978) where it was stated that 'Even though a phenomenon of nature or mathematical formula may be well known, an inventive application of the principle may be patented. Conversely, the discovery of such a phenomenon cannot support a patent unless there is some other inventive concept in its application.'

His Honour then went on to refer further to the Freeman test, and in particular, later refinements of this test which were referred to by the Patents Office delegate.

The Patents Office delegate had stated that as the claim in question was not 'directed to an industrial process' and not being limited to a particular industrial environment it was unpatentable. However, Burchett J disagreed with the delegate and noted that 'if the present specification is read as a whole, ... there is a necessary inference confining the relevant claim to the operation of computers'.

His Honour then proceeded to consider the broad principle in question which principle was discussed in the case of *National Research Development Corp v. Commissioner of Patents* (1959) 102 CLR 252. This case involved a process for ridding crops of certain weeds, without damaging the crops, by the use of compounds harmless to the crops but deadly to the weeds. The inventive-

ness was the realisation of the selective effect of the compounds. In that case it was stated that if a new use of a known substance 'consists in taking advantage of a hitherto unknown or unsuspected property of the material ... there may be invention in the suggestion that the substance may be used to serve the new purpose; and then, provided that practical method of so using it is disclosed and that the process comes within the concept of patent law ultimately traceable to the use in the Statute of Monopolies of the words 'manner of manufacture', all the elements of a patentable invention are present ... It is not necessary that in addition the proposed method should itself be novel or involve any inventive step'.

Burchett J stated that these observations are likewise applicable to the law of mathematics and we emphasised that it is impossible to define the width of the meaning of 'manufacture' as referred to in the Statute of Monopolies. Burchett J noted that for a process to be a patentable invention it must be of some useful effect, this useful step taking it beyond a mere discovery or use of a principle of science.

In this case Burchett J was of the opinion that 'that use of the algorithm is not different conceptually from the use of the compounds involved in the NRDC case. Just as those compounds were previously known, so here, it is not suggested there is anything new about the mathematics of the invention. What is new is the application of the selected mathematical methods to computers, and in particular, to the production of the desired curve by computer. This is said to involve steps which are foreign to the normal use of computers, and, for that reason, to be inventive. The production of an improved curve im-

age is a commercially useful effect in computer graphics'.

His Honour then referred to the US case of *Diamond, Commissioner of Patents and Trade Marks v. Diehr and Lutton* in which case it was stated that '[i]t is now commonplace that an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection'.

Burchett J held that in this case 'the formula is applied to achieve an end, the production of the improved curve image. A method of producing that by computer, which is novel and inventive, is entitled to the protection of the patent laws'. The appeal was allowed.

Patents Office practice

Following the decision of Burchett J in the IBM case, the Patents Office has updated the Examiners Manual. In the manual, in relation to computer related inventions, the IBM case and the findings of Burchett J are noted. Further, it is stated that 'The test to be applied when determining the patentability of computer software related inventions is derived from the NRDC test. That is: 'Does the invention claimed involved the production of some commercially useful effect?' The manual goes on to provide illustrations of this test, and in particular it is noted that 'A claim to a mathematical algorithm when used in a computer is patentable so long as a commercially useful effect is produced.' The following examples of commercially useful effects are also set out in the manual:

- '(a) an improved image, where the image is commercially useful. In the IBM case, the improved curve image was

useful in computer graphics.

- (b) an algorithm that results in more efficient operation of a computer'.

Finally it is stated that the general test as to whether a commercially useful effect is produced supersedes the Freeman test and it is stated that 'examiners are not to base objections on the Freeman test or other related United States authorities'.

It appears, therefore, on the basis of the IBM case that there is some scope for patents to be granted in respect of computer programs, so long as the programs, and the algorithms applied in the programs are applied so as to achieve some 'commercially useful effect'.

Trade marks

A well-established trade mark may be an extremely valuable asset, as significant goodwill may attach to that mark. That is, when a member of the public sees that mark, they immediately associate the goods or services identified by that mark with a particular source and on this basis make a purchase decision, it is a badge of origin and quality. For instance, a consumer may choose to buy a particular computer program on the basis that it is produced by 'Microsoft' and therefore the consumer will have certain expectations in relation to that software.

A competing software producer may wish to take advantage of this attraction for consumers by using the same or a similar mark so that consumers are deceived or confused into thinking that the rival product is also produced by, or in some way endorsed or approved by the manufacturers of 'Microsoft'.

Software producers may protect themselves against this appropriation of their goodwill associated with their product by a rival by registering their mark as a trade mark under the *Trade Marks Act, 1955*. Unregistered marks may also be protected under the law of passing off and under Part V of the TPA.

If registering trade marks in respect of computer software registration should generally be obtained in classes 9, 16 and 42 of the NICE classification.

Trade mark law will not provide any protection where for example

"...trade mark law alone provides inadequate protection for computer programs"

the functionality of a computer program has been appropriated but has been sold under a name other than the name which is generally applied to that software. As such, trade mark law alone provides inadequate protection for computer programs.

Confidential information

Another form of protection which may be available in certain circumstances to protect computer software is the action of breach of confidence. In order to obtain protection in this manner, it is necessary to establish the existence of the following three elements:

- (a) the information for which protection is sought is confidential in nature. The law will not grant

protection to information which is public knowledge;

- (b) the information was disclosed in circumstances which imposed an obligation of confidence on the disclosee. Such circumstances may be implied on the basis of the relationship existing between the disclosee and the discloser at the time of disclosure, such as the relationship of employer and employee. Otherwise, it is necessary to prove that a reasonable person, in the situation of the disclosee, would have realised that the information was being disclosed in confidence or for a limited purpose; and
- (c) the disclosee must make, or be about to make, an authorised disclosure of the information.

From the point of view of the computer industry and the protection of computer software, this action is to be relied on, the following precautions would need to be taken:

1. restricted disclosure of the confidential information, such as the source code, within the organisation/software house. This is because a court will have regard to the manner in which a plaintiff has treated the information in making its assessment whether the information is truly confidential.
2. use of documents or data should be limited to a specific purpose;
3. maintenance of adequate security measures in relation to the accessibility of the information.
4. truly confidential information should be labelled to that effect. However, care should be taken in labelling as the indiscriminate use of such labels may reduce their effectiveness in relation to

that information which is truly confidential.

However, there are various problems in relation to use of this form of protection for computer software, and in particular, mass-marketed software. Where the software has been made available on a large scale to the consumer market the confidential nature of the software will be diminished accordingly. Furthermore, it was stated above that the information for which protection is sought must not be generally available to the public. Therefore, where the software is very similar in function to other software already on the market, it is less likely that a plaintiff would be able to establish this feature.

In short although this action may be used successfully to protect confidential information in relation to computer programs in the employer/employee situation, as it has been used in several cases in the United States, it is unlikely that the action will be of much solace for the producers of packaged software once that software or functionally similar software is publicly available.

Preventative measures

From a practical view point, other precautions which should be taken in order to maximise the protection of rights associated with computer software are:

1. make sure that as the owner of the software, you are also the owner of the copyright in the software.

Under section 35 of the Copyright Act, ownership of copyrights vests in the author of the work. The author will also be the owner of copyright in the work unless, for instance, the author:

- (a) is an employee and the computer program is made pursuant to the contract of employment;
- (b) there is an assignment of the copyright by the author; or
- (c) there is an agreement to the contrary.

This means that where an independent consultant is the author of a computer program, they will be the owner of the copyright. Therefore, it is important to obtain an assignment in writing of

"The regime ... provides a sound structure for the protection of owner/supplier rights arising in computer programs"

the ownership of copyright from any consultants engaged in the production of software.

2. make sure that a copyright notice is displayed on the computer screen when the program is 'run'. Such a warning will serve as notice to any would-be infringer of copyright in a computer program. And, this notice will be of assistance to a copyright owner as it goes to the question of damages payable by the infringer.
3. the use of unique serial numbers on each copy of a computer program supplied to the market will assist a software supplier in asserting its rights in respect of that software.

4. requesting purchasers of software to register their names and details of their purchase can also be a useful measure for software suppliers to adopt.
5. maintaining detailed registers of employees who have been engaged to write code, and ensuring that the work is performed pursuant to a written contract of employment will assist the evidentiary position of an owner seeking to enforce rights.
6. the Business Software Association of Australia (BSAA) has had enormous success in raising the additional awareness of piracy by undertaking an extensive user education program. More recently the BSAA has launched a reward scheme seeking to discourage disclosure of end user piracy. The BSAA has also been active in monitoring situations of parallel importation and raising consumer awareness about the false economies associated with grey product.

Conclusion

The regime provided by copyright law provides a sound structure for the protection of owner/supplier rights arising in computer programs. While this regime may be augmented by the use of other regimes eg contract law, in the form of shrinkwrap (or other) licences and patent law, copyright law remains a jurisprudentially sound structure and significant commercialisation benefits arise from the international conventions which it supports. \square

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