CLRC Draft Report on the Protection of Computer Programs

by Sharyn Ch'ang

Introduction

The long awaited Report of the Australian Copyright Law Review Committee (CLRC) on Computer Software Protection was published in draft form on 25 June 1993.

The comprehensive 344 page Report contains over 50 recommendations and discussion thereof. It also contains a Glossary of Terms, which include the CLRC's definition of such words as decompilation, interoperability and reverse engineering (pp296-298) and 12 reference appendices.

This article summarises the CLRC's key recommendations and brief comment is made upon some of the recommendations. The author notes that certain recommendations of the Report are likely to spawn considerable debate on the subjects they address, for example, the recommendations regarding decompilation for the purposes of interoperability and error correction. The author's comments are therefore kept to a minimum at this stage and those made here are not necessarily reflective of the position of her employer.

The CLRC has invited public comment, which is due by 31 August 1993. The CLRC has stated it plans to make its final report to the Attorney-General by the end of 1993.

The CLRC's Three Terms of Reference

The CLRC's original terms of reference announced on 19 October 1988 were:

'Whether the Copyright Act 1968, as amended by the Copyright Amendment Act 1984, adequately and appropriately protects computer programs in human and machine readable forms, works created by or with the assistance of computer programs, and works stored in computer memory' ('First Reference').

On 5 January 1989, the CLRC was asked to also review its own 1988 Report on the Importation Provisions of the Copyright Act 1968 as it applies to computer programs ('Second Reference'), and on 18 January 1991 a further term of reference was added being:

'Whether there is any need to amend s88 (of the Copyright Act 1968) to provide expressly that the copyright in a published edition extends beyond reproduction by a means that includes a photographic process to reproduce from a database where entry of the work was effected by purely electronic or mechanical means' ('Third Reference').

Summary of Recommendations - the First Reference

For each recommendation below, it has been noted as to whether the recommendation reflects no change, clarification, change or new amendment to the existing copyright regime, or whether the CLRC decided to make no recommendation, has deferred its decision for recommendation or is seeking further submission on the subject matter.

Form of Protection: No change

- Computer programs should continue to be protected as literary works under the *Copyright Act* 1968.

  Comment: Interestingly, the CLRC's preferred option as stated at para 4.25 of the Report was to recommend that the 'optimum form of protection would be to remove computer programs from Part III of the (Copyright) Act and place it in Part IV as a separate category of subject matter'. The CLRC however came to recommend maintenance of the status quo for various reasons, including the recognition of Australia's international obligations under the Berne Convention and the reality that to depart from the current law, which enjoys consistency with the laws of many other countries, may have significant commercial consequences for Australia and its growing software industry.

Definition of computer program: Change

- Australia should adopt the 1976 *US Copyright Act* definition of computer program, which is:

  'A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.'

Ownership: Clarification

- Subject to any agreement to the contrary, if a program is made

by an employee in the course of employment, the employer owns the first copyright.

- Subject to any agreement to the contrary, if a program is made under commission, the commissioner owns the first copyright.
- In any other case, the author owns the first copyright.

Duration: No change

- Existing term of protection, of life of the author plus 50 years, to prevail.

Exclusive Rights of Copyright Owner:

- Economic rights: No change

  Copyright owner's rights in a program should be the same as for any other literary work under the prevailing *Copyright Act.*

- Look and Feel: No change

  The CLRC characterises 'look and feel' or the 'user interface' as 'behaviour rather than expression capable of copyright protection'. No amendments should be made to secure protection for the 'look and feel' of a program. However, the CLRC makes no recommendation as to whether these 'behavioural aspects of programs should be protected by other forms of legislation'.

- Non-literal elements: Clarification

  The structure, sequence and organisation of a computer program's code should be protected in the same manner and to the same extent as traditional literary works. No specific provision is therefore required.

- Screen displays: Specific submissions sought

  The CLRC seeks specific comment on the need for additional or alternative protection for screen displays.

- Rental Right: New amendment

  A rental right for computer programs is recommended, but is subject to the copyright owner's right to authorise or prohibit the rental of their programs.

  Comment: If a computer program copyright owner desired to prohibit rental of a particular program, given the recommendation, it would be prudent to expressly include such prohibition in the relevant licence agreement.

- Public Lending Right: Specific submissions sought

  The CLRC inclines towards relieving the copyright owner of the owners' exclusive right to authorise or prohibit the public lending of the program, but public comment is sought.

  Comment: If a computer program copyright owner desired to prohibit the public lending of a particular program, given the recommendation, it would again be prudent to include expressly such prohibition in the relevant licence agreement.

- Moral rights: No change

  'Moral rights', an English translation of the French concept of 'droit moral', recognise that irrespective of whether an author or creator may have divested him/herself of all economic rights, eg: assigned all copyright in a work to another, the creator retains an inalienable right to prevent any interference with the work that offends the reputation or honour of the creator.

  Whilst the issue of legislative acknowledgment of moral rights has been discussed in Australia over many years, the *Copyright Act* does not confer protection for an author's 'moral rights' and to date, no proposals for legislation have been made by the Government.

  The CLRC has recommended that computer programs should be protected in the same way as other literary works under the *Copyright Act*, with no moral rights vesting in the original copyright.

Exceptions to Exclusive Rights of Copyright Owners

- Copying for Normal Use: Change

  The copying of a legitimate copy of a computer program where the making of that copy is reasonable or necessary for the normal use of the program should be permitted.

  The making of an ephemeral copy of a computer program that is incidental to the normal backup copying of business data for security purposes should not be an infringement of copyright.

- Back-up Copying: Clarification

  Subject to the copyright owner's right to direct expressly against the making of a back-up copy of a computer program, a back-up copy of a legitimately acquired program may be made and if the original or back-up copy is destroyed or damaged, another back-up copy of the surviving original or back-up copy, as the case may be, may be made.

  Comment: If a computer program copyright owner desired to

prohibit the making of a back-up copy of a particular program, given the recommendation, it would be prudent to include expressly such prohibition in the relevant licence agreement.

- Defeating Program Locks: New amendment

  Subject to the CLRCs recommendation concerning copying for Error Correction (see below), the copying or modification of a computer program that has been locked against such copying should not be permitted without the copyright owner's consent. The rationale for this is that the 'locking' is the copyright owner's signal that they wish to prevent the making of copies other than for normal use (para 10.15).

  Copyright owner's and their exclusive licencees should have the right to prevent the commercial manufacture, importation, distribution and possession of devices designed to facilitate the unauthorised circumvention of locks applied to protect computer programs from unauthorised copying. It appears this recommendation is reflective of the provision in s296 of the UK *Copyright, Designs and Patents Act* 1988.

  Comment: If a computer program utilises a locking mechanism and the copyright owner desired to prohibit the copying or modification of that particular program, given the recommendation, it would be prudent to include expressly such prohibition in the relevant licence agreement.

- Modifying Existing Programs - No change

  The right to modify programs to render them interoperable should be left to negotiation between the user and copyright owner.

- Porting - No change

  The right to modify computer programs to enable them to run on other computers should remain the exclusive right of the copyright owner.

- Error Correction (debugging) - New amendment

  Where a 'correctly functioning version of the program is **not available within a reasonable time at a normal commercial price**' (emphasis added) it should not be considered an infringement of copyright if a lawful user of the computer program was to reproduce or adapt the program to restore its intended functionality.

  Comment: The CLRC has noted that what constitutes a 'reasonable time' and 'normal commercial price' will depend upon the circumstances in each case (para 10.58). This is potentially contentious and impacts the operation of the recommendation to permit decompilation for error correction recited below.

- Decompilation for Interoperability - New amendment

  'Decompilation of a computer program should be allowed where it is necessary to achieve the interoperability of an independently created computer program with other programs provided:

  1. decompilation is performed by the owner of a lawfully acquired copy of the program or another person having a right to use the copy or on their behalf by a person authorised to do so;
  2. the information necessary to achieve interoperability has not previously been readily available; and
  3. the acts are confined to the parts of the program necessary to achieve interoperability.

  The following limitations should apply:

  (a) the decompilation should only be used to achieve interoperability; and

  (b) the information obtained should only be given to others when necessary for the interoperability of the independently created program.' (quoted verbatim)

Comment: This recommendation is based upon the CLRC's stated endorsement of Article 6 of the EC Commission Directive on the Legal Protection of Computer Programs and the US Court of Appeals case *Sega Enterprises v Accolade* 20 October 1992 (p178).

The text is almost a verbatim copy of Article 6 of the EC Directive. However it is notable there is no equivalent to the para 2(c) restriction of Article 6, ie: information obtained through the right of decompilation shall not be:

> '2(c) used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.'

There is no reason given in the Report as to why this was omitted. If Australia is to follow the path of the EC as is recommended, it would appear prudent to maintain consistency with the full text of the counterpart EC Article.

- Decompilation for Error Correction - New amendment

  To the extent that it would not be authorised by the recommendation (to allow decompilation for interoperability), 'decompilation of a computer program should be allowed where it is necessary to correct errors in the operation of the program provided:

  1. decompilation is performed by the owner of a lawfully acquired copy of the program or another person having a right to use the copy or on their behalf by a person authorised to do so;
  2. a version of the computer program free of the error has not previously been readily available; and
  3. the acts are confined to parts of the program necessary to correct the error.

     The following limitation should apply:

  4. the decompilation should only be used to achieve error free correction; and
  5. the information obtained should only be given to others for the purpose of correcting errors.' (quoted verbatim)

     Comment: This additional derogation of rights with respect to decompilation for error correction, a right not to be found in the EC Directive, is new.

- Decompilation to Understand Techniques - No change

  There should be no special exception to allow decompilation for the purpose of understanding techniques. Any requirement for such should remain governed by the fair dealing provisions of the *Copyright Act.*

- The Onus of Proof - New amendment

  The person who seeks to justify reliance upon any exception permitted for decompilation for interoperability or error correction bears the onus of satisfying the court of the justifiable purpose. This onus is consistent with the onus on a person who seeks to rely upon the fair dealing and other current exceptions in Part III, Division 3 of the *Copyright Act.*

- Crown Use of Computer Programs - Change

  The copying of programs for the service of the Commonwealth, State and Territory Governments should be restricted to cases where a copy of the program cannot be obtained from the copyright owner or his or her agent within a reasonable time at a normal commercial price.

- Home (own use) copying - No change

  Domestic copying of computer programs should be treated no differently from copying of other literary works.

  It is noted that a majority of the CLRC does not favour the introduction of a scheme analogous to the Blank Tape Royalty Scheme, which in effect returns a royalty to sound recording, music and lyric copyright owners on the assumption that a blank tape will be used in the domestic environment record non-original music and audio.

- Public Domain Computer Programs and Shareware - No change

  No special provisions should be made in the *Copyright Act* with respect to public domain computer programs and shareware.

- Overlap of the *Copyright Act* 1968 and the *Circuit Layouts Act* 1989 - Clarification

  Specific wording in s24(2) of the Circuit Layouts Act 1989 namely, 'infringement of that copyright', be replaced with words 'to the effect that the making was done without the consent of the copyright owner in place of manufacture'.

  Comment: The *Circuit Layouts Act* provides specific protection for the designs of integrated circuits. Section 24 of that Act concerns the commercial exploitation of original designs for integrated circuits.

  The impetus for change came from submissions made by Apple, Avel Pty Ltd and Microsoft (pp188-196) regarding their concern that the effect of s24(2) is to deny parallel importation protection under ss37 and 38 of the Copyright Act to all works stored in ROM.

  However, ultimately, the CLRC has recommended only a clarification of s24(2) and confirmed the underlying policy of the section that '(c)ircuit layouts and integrated circuits are non-copyright utilitarian articles. The nature of the intellectual property rights in such articles does not include the right to control the importation of legitimate copies of the article. Furthermore the rights owner should be prevented from obtaining copyright protec-

tion for such articles by simply including copyright works in them' (para 10.99).

- Educational Use

  1. Compulsory Licences - No change but review in 3 years.

     Although those interests representing the educational community in Australia submitted to the CLRC that they were confident of their ability to negotiate satisfactory licences with computer program suppliers, the CLRC has voiced its doubts as to this conclusion. It has therefore recommended a review of the status quo in three years' time.

  2. Copyright Infringement by Education Institutions - No change

     Whilst the CLRC acknowledge the difficulty in ensuring the use of only properly licenced computer programs within educational institutions, it considers that no special dispensation should be given to such institutions in respect of copyright infringement.

- Works Created by or with the Assistance of Computer Programs

  1. Definition of 'computer-generated work' - New amendment

     A new definition should be inserted in the *Copyright Act* of a 'computer-generated work', such definition being 'a work that is generated by a computer in circumstances such that there is no human author of the work'.

  2. Author of computer-generated work - New amendment

     'The author of a computer-generated work should be the person who arranges for the creation of the work, or for whom the arrangements necessary for the creation of the work are undertaken.'

  3. Duration of copyright in a computer-generated work - New amendment

     'Where the author is a legal person, duration of copyright in a computer-generated work should be 50 years from the end of the year in which the work was made.'

- Works Stored in Computer Memory

  1. Definition of computer databases or compilations - No change

     The current *Copyright Act* does not define 'computer databases' or 'compilations'. The CLRC recommended no definition should be added.

  2. Screen Displays - Clarification

     The Copyright Act should be amended to make it clear that screen displays do not constitute a reproduction in a material form of works stored in computer memory.

  3. Jurisdiction of the Copyright Tribunal - Change

     The jurisdiction of the Copyright Tribunal is currently restricted to adjudication of broadcasting and performance licences of copyright works, with its main function being to determine the amount of equitable remuneration due to a copyright owner for use of the owner's work.

     The CLRC has recommended the Tribunal's jurisdiction be extended to licence agreements involving the use of copyright materials in electronic databases.

  4. Screen Displays are not Public Performances - New amendment

     The screen display of a work stored in computer memory does not, per se, constitute a public performance of that work.

  5. Input and Output to Computer Memory - No change

     The introduction of a 'use right' for copyright owners to regulate the input and retrieval of works into and from computer memory is not justified or necessary.

  6. Hardcopy Reproduction of a Database - New amendment

     'Where the licence of a database provider does not extend to authorising the making of hardcopy by database users, the networking of the database to subscribers would not, of itself, amount to authorisation of the making of such copies if the act of accessing by users of the database caused a message to appear on the screen containing relevant information about copyright in the database.'

  7. Database Not a Diffusion Service - No change

     Transmission to subscribers to a diffusion service is the exclusive right of owners of copyright in literary, artistic and musical works and cinematographic films, broadcasts and, to a limited extent,

artistic works. Section 26 of the *Copyright Act* defines such transmission as a transmission 'over wires or other paths provided by a material substance' (which would appear to cover fibre optic cable) of those materials 'in the course of a service of distributing broadcast or other matter ... to the premises of subscribers to the service'.

The CLRC is of the view that 'as many databases do not fall within the definition of a diffusion service, eg, those in libraries or confined to one business or other organisation, it would not be appropriate to extend 'diffusion service' beyond its evident focus, ie, cable, TV and radio services' (para 14.23).

8. Multimedia, Hypertext and other new types of computerised works - Specific submissions sought

   The CLRC received no submissions with regard to the above, but recognise these new technologies may generate new copyright issues.

9. Duration of Copyright in a Database - No change

   Databases should be protected for the same period as other literary works - ie: life of the author plus 50 years.

10. Authorship of a Database - No change

    The authorship of works which are stored or created in computer memory should be regarded no differently to other works such as compilations or other directories of factual information.

    The test of authorship will require consideration to be given to those persons who expended a sufficient degree of skill and labour to create an original work.

11. Ownership of a Database - No change

    The Copyright Act currently provides that the person controlling or co-ordinating the preparation or maintenance of a database may secure copyright ownership in all material input into the database by contract with the authors, and in the absence of contractual arrangements to the contrary, such person has copyright in all input by his or her employees (para 14.39).

    The ownership of works which are stored or created in computer memory should be regarded no differently to other works such as compilations or other directories of factual information.

12. Protection of Non-original Databases - Specific submission sought

    The CLRC has commented that the possible need for a 'right of unfair extraction from a database' has not been explored by the CLRC or in any submissions received. The concept of such right is proposed in the EC Commission draft Directive on Database Protection. In essence, the right accrues to the maker of a database, who, for a period of 10 years from the date when the database is first lawfully made available to the public, can prevent the unauthorised extraction or utilisation from that database, of its contents, in whole or in part, for commercial purposes, irrespective of the eligibility of the database for protection under copyright.

13. Databases using Newspaper or Journal Articles - Recommendation deferred

    Whilst the CLRC acknowledge that electronic storage is not essentially different from hardcopy archival storage of materials, the ownership of copyright in journalists' materials when used by newspaper publishers in electronic news databases has been deferred to a consideration of the full application of s35(4) of the *Copyright Act*, which is the subject of a separate current CLRC Reference.

- Other Issues Raised in Submissions

  1. Delivery of Library Material to the National Library - Change

     Section 201 of the *Copyright Act* provides that the publisher of any 'library material' published in Australia and in which copyright subsists, must deposit a copy of such material with the National Library within one month after publication. Library material is broadly defined and includes a 'book, periodical newspaper, pamphlet ... sheet of music' etc.

     The CLRC has recommended that the definition of s201 of the *Copyright Act* be amended to include computer programs and works stored in computer memory; and that in relation to these classes of materials, the National Li-

brary should be given a discretion to determine the particular materials for inclusion in its collection.

2. Archival Copying of Materials into Machine Readable Form - Specific submissions sought concerning any appropriate limitations on the recommendation

   Whilst the CLRC recommends that archives should be allowed to be make copies of computer programs for the limited purposes of preserving and assessing archival material deposited in machine readable form, further submissions are invited regarding the limitations that ought to be placed upon such right.

3. Proof of Ownership of Copyright in Computer Programs - New Amendment

   A provision like the proposed s126A in clause 11 of the *Copyright Amendment Bill* 1992, should be introduced in respect of computer programs.

   Comment: The essence of the proposed s126A is to facilitate the enforcement of a copyright owner's right in civil sound recording piracy proceedings where the plaintiff must establish the subsistence and ownership of copyright in the work. The proposal is to accept the presumption of the copyright owners' claim upon the filing of an affidavit stating relevant facts such as date and first place of publication, creator and ownership or exclusive licencee status (pp285-288).

4. Privilege Against Self-incrimination - No recommendation made

   Whilst the CLRC favours removal of the privilege against self-incrimination in civil proceedings relating to copyright infringement, this matter is being considered by the Standing Committee of Attorneys-General on the new evidence law and hence no recommendation need be made.

5. Possession of Infringing Copies of Computer Programs in the Course of a Business - Specific submissions sought

   Further comment is sought on the creation of a civil right of action by a copyright owner against a person for possession, for commercial purposes, of computer program copies which he or she knows or has reason to believe are infringing, ie, a counterpart action to the offence in s132(2A) of the *Copyright Act*, and if so, whether the wider infringing activity of 'possession in the course of business' (as in the s23 of the UK *Copyright, Designs and Patents Act* 1988) would be more appropriate.

6. Anton Piller Orders - Beyond the Terms of Reference

   Although the CLRC recommends serious consideration of a proposal by Microsoft Corporation to codify the circumstances for the issue of an Anton Piller Order, it considered any recommendation should be made in a context broader than copyright law and in any event, not within the CLRC's terms of reference.

7. Penalties for Criminal Offences under the *Copyright Act* - Change

   Criminal penalties for computer software piracy should be brought into line with those currently applying to films and proposed for sound recordings.

Summary of Recommendations - the Second Reference

The focus of the Second Reference was the parallel importation of computer programs. The recommendations are made after the CLRC's consideration of the December 1992 Report of the Prices Surveillance Authority (PSA) into the Prices of Computer Software, and reconsideration of its own September 1988 Report on the Importation Provisions of the *Copyright Act* 1968.

- Parallel Importation Provisions - Change

  The CLRC is divided on the issue of parallel importation, with only a bare majority of the 10 person Committee agreeing with the recommendations of the PSA. The majority recommends:

  1. 'parallel importation of copies of computer programs and subsequent commercial dealing with such imported copies should be allowed **from only those countries which are the main sources of computer programs used in Australia**' (emphasis added).

  2. parallel importation of, and subsequent commercial dealing with, computer manuals (whether or not sold together with computer programs) should be permitted to the same extent'.

Comment: This recommendation is far broader than those introduced by the *Copyright Amendment Act 1991* in relation to relaxing parallel import laws concerning books. (Note: Computer manuals were explicitly excluded from the category of 'books' at the time of the 1991 amendments.) It is also open to interpretation as to which countries are to be designated as those of the main sources of computer programs.

The parallel importation laws regarding books removed the copyright owner's control only after an 'unavailability' test has been met. The unavailability conditions that must be satisfied are as follows:

1. where a book is first published outside Australia and not published in Australia within 30 days;
2. where a book first published in Australia, or published in Australia within 30 days of first publication overseas, is not obtainable from the copyright owner for 90 days, and
3. where a retailer receives a specific order for a single copy (para 11.24).

However, the CLRC's recommendation in relation to the permissible practice of the parallel importation of computer programs and manuals appears unconditional. The reason for the distinction between the treatment of 'books' and computer programs and manuals are not outlined in the Report.

1. Section 135: Australian Customs Service assistance with seizure - Clarification

   Section 135 of the *Copyright Act* currently provides that the owner of the copyright in a published literary, dramatic or musical work may notify and seek assistance from the Comptroller-General of Customs to seize such works on the basis that such importation is unauthorised by the copyright owner.

   Whilst computer programs fall within the category of 'literary works', it is recommended s135 be amended specifically to include computer programs.

2. Second-hand computer programs - New amendment

   Second-hand computer programs should be subject to the same parallel importation laws as new computer programs.

3. Decriminalisation of Parallel Importation - Change

   Infringement of the current *Copyright Act* parallel importation prohibition is a criminal offence. The recommendation previously made by the CLRC in its 1988 Report was to decriminalise the infringement. The CLRC maintains its recommendation.

   However, the CLRC adds the onus of proving reliance upon the exception and that the copy was not a pirate copy, rests with the importer.

Summary of Key Recommendations - the Third Reference

The subject of the Third Reference was published edition copyright with consideration being given to the impact of new technologies such as scanning and optical character recognition (OCR) upon the ease of 'reproduction' of published editions. Reproduction is taken to mean 'to be an exact copy of the edition'.

By an historical fact, it appears that the genesis of the United Kingdom counterpart to s88 of the *Copyright Act* was founded on a concern that photo-lithography, then the new technique of the 1950's, would allow the reproduction of a literary or musical work both quickly and cheaply, compared with the traditional type-setting process for printed materials. To protect the owner of the copyright in the published edition from such piracy, the words 'by a means that includes photographic process' were used to qualify, by example, one of the possible means of reproduction. Given that the means of manufacture of reproductions in the 1990's extends beyond a 'photographic process' and includes scanning and OCR techniques, and to extend the scope of copyright protection from printed editions to publications in computer or machine readable form, the CLRC has recommended that s88 be amended by deleting the words 'by means that include a photographic process', and affirming that 'edition' extends to editions in machine readable format (pp274-280).

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