Data Access Corporation v Powerflex Services Pty Ltd[1]

Ashely Porter

As with earlier decisions by the High Court in Computer Edge v Apple and Autodesk v Dyason, the recent judgement of Justice Jenkinson in the Federal Court has again demonstrated the need for the Copyright Act to be amended to ensure that the utilitarian nature of computer programs is reflected in a "thinner' level of protection than that granted to books and other 'expressive' works.

Australian copyright law as it applies to computer software is moving further away from US, UK and Canadian law with the result that developers in Australia are placed at a significant disadvantage to those in other parts of the world.

Facts

The facts of the case were not in dispute. Powerflex - a Victorian based company set up in 1989 by Dr David Bennett, developed a computer program called PFXplus. Data Access Corporation, a US-based company is the owner of a functionally similar computer program called DataFlex. Both programs were designed for use in the creation and manipulation of databases (ie they were programs whose function was to aid computer programmers in the development of other computer programs.)

PFXplus was initially designed by Powerflex to improve upon and be highly compatible with DataFlex. As the PFXplus program was further developed it started to compete with DataFlex. As the PFXplus program was further developed it started to compete directly with DataFlex, both in Australia and overseas.

There was no allegation that the methods used by Powerflex to develop its product gave rise to any separate copyright infringement. There was also no evidence that Powerflex had access to the source code in the DataFlex program, or that the DataFlex program was decompiled by Powerflex.

Concerns

There are several aspects of the judgement which should be of concern to Australian software developers, as well as to lawyers practising in the field of copyright:

1. the failure to exclude from the copyright protection those elements of the Powerflex program which constituted 'methods of operation' or whose use was dictated by reasons of efficiency, compatibility or industry or programming standards: Lotus Development Corporation v Borland International Inc 49F.3rd 807; Computer Associates v Altal 982 F.2d 693; and

2. the interpretation of the definition of a 'computer program' and the implication that identity of function is in some way an indication of breach of copyright.

US Law

The Computer Associates v Altal case was a watershed judgement on copyright law as it is applied to computer software, and the abstraction/filtration test which it established has become accepted jurisprudence in the US.

If the Court in this instance had applied the abstraction/filtration test it is likely (given the nature of the programs in question) that a large proportion of the individual words in the PFXplus language would have been excluded from copyright protection, as their use was dictated by Dr Bennett's original intention to create a product which was compatible with and functionally superior to the DataFlex program.

Despite making substantial reference to the decision in Lotus v Borland, the Court also failed to exclude from copyright protection those elements of the DataFlex language which constituted 'methods of operation'. On the basis of the Lotus decision, words such as 'Print', 'Show' and 'Display' would not constitute protectable expression, and Powerflex should not have been prevented from making use of such words.

Before this judgement it was, as the Copyright Law Review Committee noted in its final report on Computer Software Protection (para 6.30), generally understood that Australian copyright law did not protect methods of operation. It was on this basis that the CLRC concluded that it was not necessary to adopt a provision like s103(b) of the US Copyright Act which expressly excludes methods of operation from copyright protection.

Definition of Computer Program

The Copyright Act defines computer program as -

"an expression, in any language, code or notation, of a set of instructions intended to cause a device having digital information processing capabilities to perform a particular function"

The Court appears to have placed undue emphasis on the word 'function' in the definition, and the tenor of the judgement implies that commonality of function is an

indication of infringement. To apply this level of abstraction to computer programs is highly inappropriate (it may for instance result in one word processing program infringing a second on the basis of function alone), and when combined with the Court's decision that individual words may constitute a computer program, a conclusion of infringement was inevitable.

Implications

The decision poses great difficulties for software developers in Australia. Local developers, unlike their counterparts in the US and Europe, may not it seems reverse engineer, let alone decompile, another product in order to understand the unprotected ideas and produce a compatible, interoperable product (particularly if

the product created performs the same function as the original).

This amounts to the death knell for open systems and means that in Australia the pace and scope of innovation will be controlled by foreign companies whose product interfaces become industry standards. Open systems development will continue, but not in Australia.

Recommendations

Even though Powerflex had indicated it will appeal the decision, there is a need for legislative amendment to the Copyright Act in the following areas.

1. The adoption of a provision equivalent to s102(b) of the US Act to exclude methods of operation from copyright protection. This amendment would provide

guidance to the judiciary in cases such as this, allowing them to draw upon the extensive experience of the US decisions. At the same time such an amendment would bring Australia into compliance with its outstanding obligations under the TRIPS Agreement.

2. An amendment to the definition of computer program in line with the recommendations of the CLRC. Such an amendment would avoid the current emphasis on function evident in the Powerflex decision and the earlier High Court case of Autodesk v Dyason.

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It was only in 1983 that WIPO concluded that it was premature to recommend an international model by which computer programs should be protected.[1] Since then world opinion has effectively crystallised and copyright is the preferred means of protecting computer programs. Article 10 of TRIPS specifically extends the Berne Convention to recognise computer programs, whether in source or object code, as literary works. More than anything else, the need to adequately protect the significant investment in creating software has led to this resolution. Software is an essential element of the information economy and few businesses could operate efficiently today without information technology, all of which requires computer programs to effectively function. The success of the software

industry and the flow on effects are due in no small measure to copyright protection for software. From an early stage, Australia has recognised this commercial reality. It is only necessary to point to the 1984 amendments resulting from the first instance decision in the *Apple v Computer Edge* litigation to demonstrate this.[2]

Some of the most recent figures and forecasts relating to Australia's information industries make it clear that copyright protection of software is of great economic benefit to Australia. The Productivity Commission's report *Mapping the Information Industries* shows that during the period 1990-1994 software royalty receipts grew by 44% on a compound annual growth rate basis while software royalty payments grew by only 6% over the same period.

In general, the principles of copyright law may be applied to computer programs with no difficulty. However, from time to time the unique characteristics of computer programs raise complex questions for copyright law. In particular, the idea/expression dichotomy, although it is a central tenet of copyright law, is often difficult to apply. The utilitarian nature of computer programs has meant that much of the refinement of this fundamental principle has occurred in cases involving allegations of infringement of copyright in computer programs. These complex legal issues have been considered in the context of highly technical evidence - something which the participants in the legal system, both judges and lawyers, often find difficult to absorb.