Licences of copyright works and the Internet

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Recent decisions have highlighted the difficulty of relying on a "defence" of licence. The decisions have implications for persons wishing to access copyright works such as copyright works placed on the Internet.

"Without the licence of the owner of the copyright"

Section 36 of the Copyright Act 1968 (the Act) provides that the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia, of any act comprised in the copyright. The copyright in subject matter other than works is also infringed if an act comprised in the copyright is done without the licence of the owner of the copyright.

Section 10(1) of the Act requires an exclusive licence to be in writing. Apart from exclusive licences, there are no requirements specified in the Act for a licence to arise. The High Court in Interstate Parcel Express Co. Pty Ltd v. Time-Life International (Nederlands) B.V. held that the word "licence" means, "no more than 'consent', and a licence... need not result from a formal grant, but may be given orally or be implied by conduct." Despite the fact that this interpretation appears broad, two recent decisions suggest that the question whether a licence has arisen is construed strictly against the alleged infringer.

The difficulty of establishing an implied licence was seen in Data Access Corporation v. Powerflex Services Pty Ltd and Ors. In that proceeding, Data Access owned the copyright subsisting in computer programs known as DataFlex. Dr Bennett was the author of a computer program known as Powerflex which was sold by Powerflex Services Pty Ltd. Data Access alleged that the Powerflex program infringed the copyright in the DataFlex program by reproducing words in the DataFlex computer language. Dr Bennett and Powerflex Services argued that, if the Powerflex program infringed the DataFlex program then, as a result of communications between representatives of Data Access and Dr Bennett and the fact that Data Access has not commenced proceedings against Dr Bennett earlier (although it was aware of what he was doing) an implied licence to reproduce elements of the DataFlex program arose.

Jenkinson J held that the Powerflex program infringed the DataFlex program, and rejected the implied licence defence. The silence of Data Access after its representative examined the Powerflex program did not signify a licence. At one stage, Dr Bennett contemplated that Data Access might be going to threaten to take him and Powerflex Services to court, a state of mind not consistent with the implication of a licence. The court held that the proper inference to be drawn was not that Dr Bennett and Powerflex Services has been licensed to do what would otherwise be an infringement of copyright, but that the parties considered there had been no infringement of copyright, or at least no act which Data Access was confident that the courts would hold to be such an infringement. The content of various brochures published by Dr Bennett was also found to be inconsistent with a licence.

The question of licence was also considered in Trumpet Software Pty Ltd v. OzEmail Pty Ltd and Ors. In that case, Trumpet Software argued that the making or authorising of the reproduction of a substantial part of its Winsock software by OzEmail occurred without its permission. OzEmail obtained the Trumpet Software from the University of Tasmania's Internet site. The software was the subject of a shareware licence to enable third parties to use the software for a period of 30 days for the purpose of evaluation.

Heerey J held that Trumpet Software had revoked any licence OzEmail had to distribute the software. On the assumption that the licence had not been revoked, Trumpet argued that if publication of the software conferred any rights of distribution by OzEmail, then the licence was subject to the condition that the distribution should be:

a. without other software;

b. without modification, addition or deletion;

c. in its entirety; and

d. without charge and not for commercial gain.

Heerey J held that the evidence called by both sides as to the nature of terms and conditions of shareware licensing "fell well short of that required to establish custom in the legal sense".

Heerey J applied the doctrine of implied contractual terms as set out in BP Refinery (Westernport) Pty Ltd v. Shire of Hastings. The contractual analogy was applicable because the shareware licence would mature into a contract if a user were to effect registration. Heerey J held that, in the case of a distributor dealing with shareware, it be distributed in its entirety and without modification, addition or deletion. It was not necessary to imply a term that the software not be distributed with, or accompanied by, any other software, nor to deny the distributor the right to make any charge or commercial

gain. Heerey J held that, even if any licence in favour of OzEmail had not been revoked, OzEmail breached the conditions of the licence by making changes to the Winsock software.

The Internet

On the view of some commentators, placing a copyright work on the Internet gives an implied licence to users to copy the work: why put it there otherwise? The opposing view, supported by the recent decisions, requires clear evidence of a licence. There is no definitive answer. I think the question of whether a licence arises will depend on the nature of the copyright work (for example, MacDonalds, by establishing a home page, is not thereby licensing users to reproduce or otherwise deal with its logo) and on whether the copyright owner has "invited" users to copy or otherwise deal with the work (eg shareware). Some of the issues relating to licences of copyright works on the Internet are as follows:

Browsing and reading

Copyright works or subject matter other than works accessed on the Internet will reside for a short time in the Internet users screen memory. This will amount to a reproduction in material form of the copyright works, and hence will involve a direct infringement of the exclusive rights of the copyright owner.

In most circumstances, browsing or reading should not be regarded as an infringement of copyright: how else can users access the work?

Adaptations and other exclusive rights granted to copyright owners

Much of the debate relating to implied licences of copyright works on the Internet centres on the right of reproduction. While it is possible to consider circumstances in which a licence to reproduce a copyright work might well be implied, circumstances in which a copyright owner will be taken to have impliedly licensed others to make an adaptation of the work or do an act falling within the other exclusive rights of the copyright owner are less obvious.

Right of transmission

The Copyright Convergence Group recommended that a broad-based right of transmission to the public be introduced for copyright works for all copyright owners. Any transmission of a copyright work to, for example, a computer bulletin board service would be a direct infringement of the exclusive right of the copyright owner (assuming a transmission to a computer bulletin board service can be regarded as "to the public", which appears to be the position according to APRA v. Telstra Corporation Ltd).

Does a copyright owner who places a copyright work on the Internet impliedly licence such transmissions to take place? I think probably not, unless there is something in the context of the copyright work which "invites" the user to make such a transmission.

Context

If the placement of a copyright work on a World Wide Page by the copyright owner confers any rights on users to copy the work, is it only a licence to download the work in its intended context (eg with advertisements)? Probably not. Clear evidence would be required before the licence would be limited in this way.

Commercial or profit-depriving use

If any licence to an Internet user is implied, it would be difficult for the user to establish that it extends to reproductions for commercial or profit-depriving use by the user: see eg De Garis & Anor v. Neville Jeffress Pidler Pty Ltd.

Bulletin board services

Should the question of licence be decided less strictly where a subscriber of a computer bulletin board service accesses a copyright work placed on the bulletin board service by another subscriber than is the case with ordinary users? I think not, although a licence may be implied to transmit the works to other subscribers to the service.

Onus

The Act places the burden of showing the absence of a licence on the copyright owner, however, in practice the burden of showing a licence is placed on he alleged infringer. In relation to copyright works on the Internet, the burden of showing a licence will be difficult to discharge if there is no evidence as to whether the copyright owner consented to the alleged infringing act, eg if the copyright owner places the work on the Internet without express licence terms. It will be especially difficult to discharge if the copyright owner uses a copyright notice.

Custom or usage

The Trumpet Software case shows that it will be difficult for an alleged infringer to establish a licence implied by custom or usage. A copyright owner may adduce evidence of communications over the Internet which do not meet the custom alleged. Further, it is unlikely that a "custom" will remain the same for any period of time.

Enforceablity

Due to the global nature of the Internet, many infringements will go undetected, and, in cases where the infringement has occurred in another country, the copyright owner may not wish to incur the expense of international litigation. Courts may be reluctant to imply a licence, or will construe express licence terms strictly, t o protect the interests of copyright owners.

Conclusion

There is a necessity to strike a balance between the rights of copyright owners to exploit their works and the interests of the public to have access to those works. The balance will no doubt be readjusted over the next few years as further developments occur in relation to the Internet.

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