Cautious Optimism after Powerflex Appeal

The Full Bench of the Federal Court has restored some sanity to software copyright law in this country.

In a unanimous judgement, the Court has overturned the decision of Jenkinson J at first instance in the Data Access case on almost every point. However, as we note below, the optimism for the direction of Australian copyright law must be tempered with caution in relation to some issues.

The approach of the Court was that a proper analysis of the definition of 'computer program' under the Copyright Act must proceed from a clear understanding that a 'set of instructions' means the entire set and not single commands or reserved words in a high level language, and that function is largely irrelevant to whether copyright arises in the instructions which produce that function.

This means the local software industry can breath a collective sigh of relief, in that developers will not be found to infringe copyright by reproducing or adapting single words or commands from another program.

In addition, the scope for building code which interoperates with existing programs is expanded again, which promotes open systems and benefits users and the industry.

There is a fullsome analysis of the Full Bench judgement in the lead article in this month's issue.

However, there remain some aspects of the decision which inspire caution. First, their Honours' finding that the DataFlex Huffman compression table was a copyright compilation and not an uncopyrightable method of operation is troubling. It leaves open the possibility that open systems uptake in this country could be threatened because interoperation with any compression table will require a substantially identical table; surely this means there is only one possible way of producing the compressed data and so idea and expression have merged.

Second, there remain echoes in the judgement of the functional analysis, despite the Court elsewhere strenuously criticising it. In relation to the macro commands, their Honours stated obiter that if a set of instructions is "functionally separate" from the balance of the program then that set will be a separate copyright work from the program. This was not the case with the DataFlex macros because they were not a "substantial part" or the "linchpin" of the program. This implies that the test for copyrightability still turns on whether the elements under consideration are essential or substantial.

The Court is to be congratulated for returning Australian computer law into broad alignment with the rest of the world. The case provided further clarification of the scope of protection for computer programs by clearly articulating the difficult distinction between expression and idea in relation to a set of instructions. These aspects of the judgement are to be welcomed.

Given the troubling aspects noted above, however, it may be that certainty for the IT industry can only be achieved through amendment to the Copyright Act, as part of the CLRC's comprehensive modernisation and simplification of the legislation under its current terms of reference or otherwise.

A WARM WELCOME FROM THE PRESIDENT AND COMMITTEE MEMBERS
OF THE NSW SOCIETY FOR COMPUTERS AND THE LAW

Welcome to the NSW Society for Computers and the Law.

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