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# Microsoft Injunction RAMs Home to Computer Suppliers—the Implications of Copying Unlicensed Software: A casenote of *Microsoft Corp & Anor v BusinessBoost Pty Ltd & Ors* [1999] FCA 1384

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On 8 October 1999, Justice Tamberlin of the Federal Court of Australia awarded Microsoft Corp an interlocutory injunction against Theresa Milosevic, the sole director, secretary and shareholder of Passions Pty Limited, trading under the name StarWorks Promotions Marketing ("StarWorks").

Microsoft alleged that StarWorks (a supplier of computer hardware and software) had infringed sec 36(1) of the *Copyright Act 1968* by first, loading and storing Microsoft programs on a hard disk and second, causing Microsoft software to be loaded into RAM<sup>1</sup> each time the program was launched. The injunction was sought against Ms Milosevic as the, "company's directing mind and will."

Affidavit evidence was provided by three StarWorks' customers who purchased computer packages from StarWorks in late 1998. In each case, the customers received a computer that had Microsoft products installed on the hard drive (Windows 3.1, Microsoft DOS or Windows 95), however, the customers did not receive the original disks or manuals. In each case, the customer was told by Ms Milosevic that the programs were "shareware." When questioned why they were not given any disks or licences, one customer was told, "that's just the way it is. We actually bought the rights from Microsoft..." However, based on the terms of the

standard Microsoft Licence Agreement, Tamberlin J could find no evidence that Ms Milosevic had, "permission or licence" to copy the Microsoft products.

The subsistence of Microsoft's copyright was not in dispute, rather the occurrence of its infringement. Under sec 31(1)(a)(i) of the *Copyright Act 1968*, copyright includes the exclusive right to reproduce a literary work in a material form. "Literary work" is defined in sec 10 to include a computer program or compilation of computer programs. However, the classification of the Microsoft software as a "computer program" was not challenged by Ms Milosevic.

In order to award the injunction, Tamberlin J had to find that there was a serious question of law either to whether the:

- (a) launching of a computer program for temporary storage and operation in RAM is a reproduction in material form; or
- (b) transfer of a program to the hard disk is a reproduction in a material form.

A similar question was addressed in *Dyason v Autodesk Inc* (1990) 18 IPR 109, where Sheppard J found that the loading onto the hard disk from a floppy disk was a reproduction. As an aside, Sheppard J considered the legal implications of a transfer into RAM, but left the issue unresolved. The

other judges in *Dyason* (Beaumont and Lockhart JJ) left the question open.

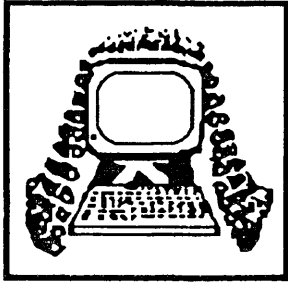
Based on *Dyason*, Tamberlin J was satisfied that there was a serious question of law as to whether Ms Milosevic's conduct in installing the Microsoft programs infringed copyright, and accordingly awarded the injunction, restraining Ms Milosevic from reproducing any more of the Microsoft products.

On the question of balance of convenience and competing hardships, Tamberlin J rejected the claim by Ms Milosevic that an injunction would bring her great hardship. Tamberlin J did not consider it relevant that there was no evidence of any threat that Ms Milosevic would resume her illegal software copying, instead he was satisfied by Microsoft's undertaking as to damages and the capacity of Microsoft to meet this undertaking if necessary.

Interestingly, Tamberlin J considered the explanatory memorandum to the *Copyright Amendment (Computer Programs) Act 1999 (Cth)*, which proceeds on the assumption that "running" a program could amount to a copyright infringement, to be of only marginal assistance in this case.

<sup>1</sup> Random Access Memory is the component of a computer that temporarily stores data being used by the computer. RAM is erased when the computer is turned off.

# Computers & Law Journal



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