



Trumpet decision sounds a blue note for OzEmail

Trumpet Software Pty Ltd & Anor v OzEmail Pty Ltd & Ors, Federal Court of Australia, Hobart TG21 of 1995, Heerey J, 10 July 1996, unreported.

For many people the allure of shareware is not the chance to try before they buy. Rather, it is the opportunity of getting something for nothing. Over networks, shareware can be obtained with the click of a mouse button. Many users assume that an invitation to assess a program means a waiver of all rights by the owner.

The Federal Court decision in the *Trumpet Software* case has given a clear indication that, despite premature reports to the contrary, the laws of copyright are alive and well on the Internet. However, it would be a mistake to see the case as settling many of the more vexing questions that arise in the ever-changing world of cyberspace. The decision rests on very narrow grounds. Before examining the reasons for judgement, it is helpful to review the facts of the case.

Background

Trumpet Winsock was developed by Mr Peter Tattam, the Managing Director of Trumpet Software International (Trumpet). The program is an Australian success story, one of the most commonly used pieces of Internet communications software.

The Managing Director of OzEmail, Mr Sean Howard, called Mr Tattam to suggest distribution of Winsock by OzEmail in an edition of *Australian Personal Computer (APC)*, and also in a licensed distribution as part of a software package.

Later, OzEmail's Project Manager, Mr David Urquhart, sent a fax asking Mr Tattam to authorise the distribution of approximately 60,000 copies

of the unregistered version of Winsock 2.0 via the magazine. Justice Heerey examined amendments made by Mr Howard to drafts of the fax. The final version contained the sentence 'I'd appreciate your confirmation of our understanding'. He inferred that Mr Howard was aware that the proposed distribution required permission, the changes being made in the hope of leading Mr Tattam to believe that he was being asked to formalise existing rights of OzEmail).

In a later telephone conversation with Mr Urquhart, Mr Tattam said that he did not want OzEmail to proceed because the current version was not timelocked and he was concerned that the magazine distribution could result in too many opportunities for use without registration. He would consent to the distribution of a new, timelocked version he was developing.

Subsequently, OzEmail made a number of attempts to contact Mr Tattam who was still working on the timelocked version and was still unsure as to whether he should deal commercially with OzEmail. When he discovered that OzEmail was distributing Winsock via a FTP (file transfer protocol) site, he decided to end all negotiations with OzEmail and wrote asking for all unlicensed copies and all unregistered client copies to be destroyed as they had been reproduced without permission.

In the meantime, OzEmail decided to proceed with the distribution in the April edition of *APC*. Mr Howard informed Mr Tattam of the magazine distribution, asserting that the two

distributions complied with the Winsock shareware licence conditions.

OzEmail again distributed Winsock in a diskette in the August edition of *Australian PC World*, despite correspondence from Trumpet and its lawyers indicating that Trumpet did not give permission for OzEmail to make any distributions. A number of alterations were also made by OzEmail to the original Winsock programs including:

- substituting a new login file that would automatically connect to OzEmail as the ISP (Internet service provider)(the original allowed the user to make the choice);
- modifying another file with the possible consequence that the modem might not be allowed to hang up;
- deleting a 'readme' file and otherwise modifying files that would have alerted users to the fact that the Winsock was unregistered shareware distributed for evaluation purposes only; and
- deleting install files that contained a copyright and disclaimer notice.

The basis of the OzEmail defence was that the distribution of the Winsock program as shareware brought into existence an irrevocable licence that allowed it to freely distribute the program.

Trumpet argued that any rights that may have been conferred on intermediaries such as OzEmail were conditional on Winsock being distributed:

- without other software;
- without modification, addition or



deletion;

- in its entirety; and
- without charge and not for commercial gain for the purpose of enabling third parties to use the software for 30 days for evaluation purposes.

The decision

Justice Heerey examined the nature of the shareware licence. He acknowledged that it was possible that the publication of the program through FTP sites might create a bare licence, but rejected the proposition that its distribution as shareware effected an irrevocable licence. His Honour noted that such non-contractual licences might still require reasonable notice before revocation. This point was not argued by OzEmail.

His Honour found that the licence could be revoked at any time, and was in fact revoked when Mr Tattam told Mr Urquhart he did not want OzEmail to distribute Winsock. The question of reasonable notice did not arise because OzEmail was seeking permission for future use.

While OzEmail had acted to its detriment in making arrangements with magazine publishers, it was not done in reliance on any conduct of Trumpet, and could not, therefore, attract equitable relief. Rather, OzEmail appeared 'to have taken a punt that the necessary permission would be forthcoming from Trumpet or that, whatever happened, Trumpet would not sue'.

Justice Heerey also found that the fundamental purpose of the use of programs as shareware was for evaluation by potential users and OzEmail had gone beyond this. Its aim was to use the product as a gift to encourage subscribers to its own ISP service.

Both parties had called witnesses to support contentions as to the industry understanding of the terms and conditions of shareware licensing. Justice Heerey was of the opin-

ion that this evidence fell short of the standard required to establish custom in the legal sense. However, he found that it was possible to find shareware licence conditions by necessary implication, because the shareware licence would result in a contract if the program was registered by a user.

This led him to conclude that it was essential that distributors disseminate shareware in its entirety and without modification to allow end users to evaluate the product (its fundamental purpose) as produced by



its author. He did not feel it was necessary or obvious to imply a condition that Winsock was not to be distributed with any other software, providing such software was separately identified and did not interfere with the operation of Winsock.

It was inappropriate to imply a condition denying a distributor the right to make a commercial gain, or to limit the profit element in any way. However, this did not allow distributions tainted by the type of conduct engaged in by OzEmail.

Even if any licence in favour of OzEmail had not been revoked, it had breached the conditions of its licence by the changes it had made to Winsock.

An attempt to rely on the defence of innocence under section 116 of the Copyright Act was rejected. Justice Heerey felt that the August distribution spoke 'eloquently of the dis-

tain which OzEmail had for the legitimate rights of Trumpet'. Furthermore, the grant of a copyright licence being a 'service', the Judge also found OzEmail's conduct deceptive and misleading in the terms of sections 52(1) and 53 of the Trade Practices Act.

Future directions

The decision confirms that shareware licence conditions are treated by the law in the same manner as any other licence conditions. However, important questions remain open:

- Will the courts recognise conditions arising from industry practice in the future, or do the dynamics of the Internet preclude the establishment of custom?
- As technology and uses evolve, will it be necessary to imply further conditions to give efficacy to various licensing approaches for electronic delivery of software and related services?
- Does the decision reflect the situation when international transactions are involved?
- In what circumstances would or should copyright owners be prevented from withdrawing a licence?

Trumpet illustrates the problems that arise when assumptions are made about the general understandings that operate in the industry. As the demand for electronic delivery of software increases, the development of suitable licensing arrangements becomes more important. A business may hesitate to make use of shareware if the extent of their licences to make use of the software is uncertain, particularly in a networked environment.

Prudent copyright owners will make use of express conditions to maintain control over rights of distribution, and will carefully delimitate the authorised uses that may be made of their products. □

Lucy York