The protection of computer programs under Australian copyright law

Copyright law is intended to give the author of a work a protection for her/his creativity without any required formalities, so long as the criteria for the subsistence of copyright are met. In the Australian jurisdiction, this is satisfied when a subject matter reduced to a material form by a qualified person (under s.32-4) is original.

The copyright owner is granted a number of exclusive rights that allow her/him to exercise some control over the exploitation of the copyright work against infringement by unauthorised parties. The protection thus constitutes a bundle of rights - economic and moral rights – subject to exceptions and lasting for the life of the author plus 50 years. The international trend is however to recognise a 70 year protection period.

A computer program or software may be defined in generic terms as “a set of instructions designed to cause a computer to perform a particular function or to produce a particular result”.

The Copyright Act 1968 has expressly given this “set of instructions” the nature of a “work” subject to copyright law (s.10(1)), in order for Australia to fulfil, like a number of major countries, its obligations with respect to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971):

if computer programs were literary works within the Berne Convention, Australia had an obligation to protect them as such and to ensure that that protection was in accordance with the requirements of the Convention.

However, in its 1994 Computer Software Protection Report, the Copyright Law Review Committee stressed the question of the adequacy of the copyright protection:

A question which is raised for discussion from time to time in the relevant literature is whether copyright protection is appropriate. The protection which is afforded by the Act is protection which is based upon computer programs being, or being treated as, literary works. It would be possible to devise a form of protection which would treat computer programs as if they were appropriately the subject of protection by copyright legislation but, instead of treating them as works, treating them as subject matter in the same way as are films, sound recordings, sound broadcasts and published editions; see Part IV of the Act. It would also be possible to devise a form of protection which was not based on any existing regime but was special to the nature of computer programs. In the language of some of the commentators it would be a sui generis form of

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1 A subject matter is a work that falls within the categories of the Copyright Act 1968 under s.31 (literary, dramatic, musical and artistic works and adaptations) or Part IV of the Act (subject matters other than works under ss 85, 86, 87, 88: sound recordings, cinematograph films, television and sound broadcasts, published editions).

2 As for an example: s. L 123-1 of the French “Code de Propriété intellectuelle”

3 This was the definition given in Data Access; however in 1977 the WIPO used the same wording “a set of instructions…capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result” in Model Provisions on the Protection of Computer Software ([1977] Industrial Property 265)

4 CLRC, Computer Software protection Report, 1994, Chap.4

5 “The Copyright Law Review Committee is a specialist advisory body established in 1983 to inquire into and report to Government on specific copyright law issues”
protection, such as has been afforded to integrated circuit layout-designs under the
*Circuit Layouts Act 1989*.\(^6\)

As pointed out by the CLRC, it was already in 1977 when the World Intellectual Property
Organisation (WIPO) concluded that copyright protection was inappropriate for computer
Property 265)*, and proposed a *sui generis* form of protection.

These thoughts have led to the *Copyright Amendment (Computer Programs) Act 1999*, as well
as the *Copyright Amendment (Digital Agenda) Act 2000* which were intended to solve as far
as possible the uncertainties raised by case law and old texts. The *Copyright Amendment
(Digital Agenda) Bill 2000* passed the Senate and the House of Representatives on 17 August
2000 and received Royal assent on 4 September 2000; it became the *Copyright Amendment
(Digital Agenda) Act 2000*, Act No 110 of 2000. It sought to implement major reforms in
order to update Australia’s copyright regime to take into account the rapid development of
new technologies\(^7\). Nevertheless, the question raised in 1994 is still accurate; the Digital Act
has not given answers to all uncertainties and new issues have arisen; such a suggestion of a
*sui generis* protection has not been followed, and despite the other form of protection
proposed by Patent Law, copyright remains the traditional legal tool for the protection of
computer programs.

Thus, in order to understand the stakes of this particular branch of the law and the incorporeal
nature of the property right conferred by copyright law, the first step will be to draw a
historical background for the protection of computer software under copyright law in
Australia (I). It will be then necessary to expose the current mode of protection (II) and its
major weaknesses (III) before emphasising on the competitive legal instrument that is
Contract law (IV).

### I. The legal background

Before the Apple saga, it was commonly assumed that software could afford protection under
copyright law. However, in 1983 it was held at trial\(^8\) that a computer program was not a
literary work within the meaning of the Copyright Act and thus, could not be protected under
that statute\(^9\).

In *Apple Computer Inc v Computer Edge Pty Ltd*\(^10\), the *Exxon case*\(^11\) was considered as to the
definition of a computer program. The ruling of this decision stated that a literary work did
not necessarily mean that the work had to display any learning, but rather that it simply
amounted to the exercise of sufficient effort, in order to produce a certain type of result. This
result being the conveying of information, instruction or pleasure in the form of literary
enjoyment. The function, thus, of a literary work was to afford pleasure or instruction.

Despite the problematic task at that time to admit that software were indeed embodied in
material form, the judge held that computer programs were not literary work because both
source and object codes did not afford information, pleasure or instruction but merely drove a

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\(^6\) Note 4

\(^7\) Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000, Attorney-General’s Department

\(^8\) *Apple Computer Inc v Computer Edge Pty Ltd* [1983] ATPR 40-421

\(^9\) *McKeough & Stewart, Intellectual Property in Australia*, Butterworths 2\(^{nd}\) edition, p. 228

\(^10\) *Exxon Corp v. Exxon Insurance Consultants International Ltd* [1981] 2 All ER 495
machine, without performing other functions: this lack of function prevented it from attracting copyright protection. This was reversed on appeal by the Federal Court, which held that the source code of the computer program was a literary work because it effectively conveyed information understandable by trained and qualified people. The object code was itself an adaptation of the latter - more precisely a translation since it was expressed in a different language - and was also given protection.

Nevertheless, the High Court restored the trial’s judge decision as to the object code and found that it was not intended to convey any meaning understandable by human beings since it was a language for the machine itself, and was not a translation of the source code. However, the majority held that the source code written by a programmer was indeed an original literary work in which copyright subsisted.

Thus, if the decision followed the traditional use of copyright law by protecting an original work originating with an author (the source code), it was completely unfair as to the consequence by leaving the machine-readable form (the object code) open to infringement: as a result, computer programs were not offered protection. The industry consternation that followed the very first decision of the Apple trial led to a quick reform, and amendments to the Copyright Act were passed in 1984, giving the computer program the statutory definition of literary work:

Section 10(1) defined a computer program as:

“an expression of any language, code or notation of a set of instructions (whether with or without related information) intended, either directly or after either both of the following:
(1) conversion to another language, code or notation
(2) reproduction in a different material form,
to cause a device having digital information processing capabilities to perform a particular function”.

Yet, a few cases dealt with the meaning of a computer program. In 1989, in Autodesk Inc v Dyason, the definition of a computer program was first considered.

In this case, the respondent had created a device (Auto-Key) which allowed users to use the sophisticated plaintiff’s program (AutoCAD) without using the lock device normally necessary. Part of the AutoCAD program was known as “Widget C”. Widget C comprised the look-up table enabling the computer to continue to run the AutoCAD program after identification. The main issue was whether or not the computer program contained in AutoCAD was in part contained within the lock and whether the Auto-Key was itself a reproduction in material form or an adaptation of the AutoCAD program.

Northrop J considered that a substantial reproduction of a work involved basically two elements, which were that:

the infringing work sufficiently resembled the copyright work and that it was produced by the use of the copyright work.

He found that the function of both programs were identical, which amounted to an infringement. This “look and feel” analysis, which ignored the classical dichotomy idea/expression because it focused on the result of the programs rather than on the expression

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12 The decision at first instance ((1989) 15 IPR 1) went on appeal to the full Federal Court ((1990) 24 FCR 147; 18 IPR 109) and subsequently to the High Court. The High Court’s decision was handed down on 12 February 1992 ((No 1) (1992) 173 CLR 330; 22 IPR 163) (the Autodesk case). An application to the High Court to review its decision was refused (Autodesk Inc v Martin Dyason and others (No 2) (1993) 176 CLR 300; 25 IPR 33).
of them, was rejected on appeal by the Full Federal Court, which held that the lock itself
could not contain nor constitute a computer program. Despite the same result, the Auto-Key
was the development of an original idea and there was no reproduction.
But in the first trial before the High Court, it was held that the creation of a device enabling
the AutoCAD program to run was an infringement of the program, the Auto-Key lock
constituting a reproduction. The look up table was not a computer program itself because it
was not a “set of instructions”, but was “a substantial indeed essential” part of the Widget C
program. As a result, copying of the look-up table constituted copying of the program. This
finding leads to the following: it is not necessary that the reproduction of a substantial part of
a computer program should be itself a computer program.
After submissions, the case was re-open but the application dismissed. The High Court
refused the idea that the functional aspect of a program may determine its substantiality.
In 1999, the Data Access case raised similar problems. In this case, several issues were
considered. Amongst others, Jenkinson J found that each of the reserved words constituting
the dataflex language was a set of instructions, in other words, a computer program. The Full
Court reversed this decision on appeal and held that each word was a command or a cipher,
and a command is not a set of instructions. Indeed, it is the trigger for the set of instructions to
be given effect to by the computer.
The High Court considered the meaning of “an expression….of a set of instructions
..intended…to cause a device having digital information processing capabilities to perform a
particular function” to be determined according to each language in which an item is
expressed and concluded that each reserved word comprises a single instruction and was not a
set of instructions in that language.
The using of these words by the respondent did not thus amount to an infringement.
However, infringement of the Dataflex Huffman Table was found. The Huffman algorithm
allows to compress data files according to the frequency of occurrence of the characters
contained in that data file; it reduces the amount of memory space consumed by data files.
Data Access had developed a particular table using that algorithm for application to database
files by writing its own program. It was submitted that this table was a literary work under
s.10 of the Copyright Act embodied in a material form.
Dc Bennett for the respondent wrote a program which contained a table and made it
compatible with the Dataflex program. Although he used the same algorithm, he did not
decompile the Dataflex Huffman compression table but got successfully to the same result.
His source code unarguably was different.
Nevertheless, the High Court held that the standard compression table developed by
DataAccess emanated from it as a result of substantial skill and judgement (at 123). It
constituted an original literary work.
At 124, the High Court held that

The process undertaken by Dc Bennett constituted a “reproduction” of the standard
Dataflex Huffman Table. The fact that Dc Bennett used an ingenious method of
determining the bit string assigned to each character does not make the output of such
a process any less a “reproduction” than if Dc Bennett had sat down with a print-out of
the table and copy-typed it into the PFXplus program.

This quick glance at a few points of two major decisions in the field of computer programs
and copyright protection shows how difficult it is for the Courts to give justice in a new area
of law. The two Autodesk decisions have been very much criticised and are now a piece of
anthology in the Australian endeavour to adapt new technologies to law; they remain interesting because they give clues as to the current situation. Besides, the definition of a computer program has now changed but it is of little importance because there is still the concept of “a set of instructions” and it gives the reader some pieces of information. It certainly enhances the uncertainty surrounding the matter. Where the High Court expressly rejects the “look and feel” analysis in one decision, it finds infringement in the other, whereas it was accepted without doubt that decompilation had not occurred, and that the result was found independently with effort and skill. The High Court decision in relation with the Huffman compression table stands for a sanction of the result, once again the function, and not of the expression of the idea. The expression was different, there could be no reproduction since the programmer had not access to the original work, and therefore the test of infringement which requires that reproduction is constituted by a recognisable copy with objective similarity and casual connection\textsuperscript{13} was not met. Yet, there could not have been casual connection in that case. Or it means that the conditions were not intended to be applied cumulatively, and that infringement could be found more easily, loosening the incentives for creativity.

The “CADA” gave perhaps even more doubts than the answers sought for, and it will be necessary - in order to understand the main issues of the information superhighway – to look into the current protection of computer programs by copyright before highlighting the adequacy of these new provisions with the expectations of the millennium.

II. The current mode of protection

Definition. In 1994 in its Computer Software Protection report, the CLRC (Copyright Law Review Committee) recommended the definition of a computer program should be deleted and replaced. A broader definition should be given, in order to meet the international standard in this field. In 1999, the Committee issued a voluminous Simplification of the Copyright Act 1968 report and recalled this necessity\textsuperscript{14}. Indeed, the current definition at that time led to the conclusion that:

The phrase “with or without related information” may include material such as “information for programmers or users of the program, or data to be used in connection with the execution of the program”. If the related information is limited to such materials, then most multimedia entities would not fall within the definition.

The urge of the new age, the protection of multimedia works, among others, were finally heeded: some of the key reforms introduced by the Copyright Amendment (Digital Agenda) Act 2000 (the “CADA”) involved computers programs\textsuperscript{15}. The Act substituted a new definition:

\begin{quote}
A computer program is “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result”.
\end{quote}

The distinction brought forward by the 1995 CLRC Computer Software Protection report between “material created with the assistance of computer programs” and “material created

\textsuperscript{13} Coogi Australia Pty Ltd v Hysport International Pty Ltd (1998) 41 IPR 593
\textsuperscript{14} Copyright Law Review Committee, 1999, Simplification of the Copyright Act 1968, Part II Categorisation of subject matter and exclusive rights and other issues, § 5.47
\textsuperscript{15} Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000, Attorney-General’s Department, note 2
by computer programs\textsuperscript{16} was definitely withdrawn, considered as being eventually too big a source of complexity.

As it has been seen above, the old definition has raised little cases and no court has yet dealt with the new one.

(i) Exclusive rights of the copyright owner

The purpose of copyright is to encourage people to use their skill, time and resources to create material which is of cultural and economic benefit to society. It does this by giving the copyright owner legal rights to control other’s use of that material and earn income from the skill and effort which went into creating the material\textsuperscript{17}.

The first step is to identify the copyright owner. In the case of software she/he should, as a general rule, be the programmer who wrote the program. However, if the work has been made by an employee in the course of employment and as part of his duties, the first owner will be the employer. It is worth noting that in case of a material created or first published under its direction or control, a government will be the first owner. Although these exceptions may be altered by agreement, the important question whether contract can override copyright provisions will be discussed further down.

Section 31 of the Act provides that the exclusive rights may be described as follow:

- **the right to reproduce** the work in a material form: s.21(5) of the Act stipulates that a computer program is taken to have been reproduced if there is an act of compilation or decompilation. More precisely if a) an object code version of the program is derived from the program in source code by any process including compilation or, b) a source code version of the program is derived from the program in object code by any process, including decompilation.

The analysis would probably be more technical than what was stated in the Apple case, where Brennan J held (161 CLR 171 at 207; 6 IPR 1 at 25) that:

“The notion of reproduction still connotes a resemblance between the work in which copyright subsists and the work which is copied from. The material form to which the respective works are reduced need not be the same, but if the forms are so dissimilar as to deny resemblance between the works, one cannot be said to be a reproduction of the other”.

However, S.47 B - introduced by the 1999 Amendments - states that a reproduction made in the course of running a copy for the purposes for which the program was designed, so long as it is done by the licensee or owner or on their behalf, that there is no express provision to the contrary and that it is not from an infringing copy of the program does not amount to an act of infringement. It does indeed constitute a “normal use” of the software. The same applies if the reproduction is made in the course of running a copy for the purpose of studying the ideas behind the program and the way it functions.

It should also be noticed that the “CADA” includes as part of the reproduction right the right to digitise the copyright material, i.e. to make a conversion into or from a digital or other electronic machine-readable form.

\textsuperscript{16} Copyright Law Review Committee, *Computer Software Protection*, 1995, Attorney-General’s Department, Canberra, chapter 13

\textsuperscript{17} Information sheet G50, *Computer software & Copyright*, November 2001, Australian Copyright Council, p.1
- the right to publish the work: i.e. to make the program public for the first time in Australia,

- the right to perform the work, which is not expressly excluded for computer programs but difficult to envisage,

- the right to make an adaptation of the program:
  the meaning of adaptation in relation to computer programs, as set out in s.10(1) of the Act, is a “version of a work whether or not in the language, code or notation in which the work was originally expressed not being a reproduction of the work”. In examining the meaning of the word “version”, the Full Court referred to the meanings of the word “version” given by the Macquarie Dictionary: “2. A translation 3. A particular form or variant of anything”.

In another decision, Coogi Australia Pty Ltd v Hysport International Pty Ltd (1998) 41 IPR 593, Drummond J emphasises on the requirements of what would be an “unauthorised adaptation”:

One computer program will therefore be unauthorised “adaptation” of another firstly, only if the whole or a substantial part of the particular form of expression of the program in which copyright is claimed appears in the allegedly infringing program in a different computer language, either at the same language level or at a different language level and, secondly, only if the allegedly infringing program has been produced by direct or indirect use in the sense described, of the copyright program.

- the right to communicate the program to the public, by making it available online or by electronically transmitting it using any type of cable or wireless technology including the internet (this new right is discussed below).

S.31(d) also provides the right to enter into a commercial rental arrangement in respect of the program. Such an arrangement is defined at s.30(A).

However, it does include such arrangement in some circumstances:
- in respect of a machine or device in which a computer program is embodied if the program is not able to be copied in the course of the ordinary use of the machine or device (s.31(3)). By device, one must not understand a device ordinarily used to store computer programs (a floppy disk, a CD ROM) (s.31(4)),
- if the computer program is not the essential object of the rental (s.31(5)).

The Copyright (WTO Amendments) Act 1994 introduced some other exemptions to commercial rental arrangements (s.31(7)):
- if the copy of the software was purchased before the commencement of Part II of the Copyright (WTO Amendments) Act 1994,
- the arrangement is done in the ordinary course of a business conducted by the program owner,
- the program owner was conducting the same business or another business including the making of commercial rental arrangement in respect of computer programs when the copy was purchased.

Data Access Corporation v Powerflex Services Pty Ltd (1999) 45 IPR 353 at 105
(ii) Exceptions to the exclusive rights

The Copyright Amendment Act 1999 introduced different kind of exceptions in relation to computer programs, in ss. 47 of the Act. In other words, no authorisation is required for doing any of these:

- **47 C: making a back up copy of a computer program.** The owner of a legitimate software may make a copy of it either to use it in lieu of the original copy or to store a copy for use in case the original or an earlier reproduction is lost, destroyed or rendered unusable. The section also allows the user to make a reproduction if it is part of the normal back-up copying of data for security purposes. But, it is mentioned that such a right cannot be enforced if the owner of a program has designed it in a way that copies cannot be made without modifying the program. This provision legitimates the use of “locks” or other technological devices built into the program. In other words, it completely renders this exception useless and contrary to its enactment. What if the software purchased is rendered unusable and no copies can be made? Would this be lawful? Law of torts could certainly applies, but considering the stakes, it is very unlikely that a common user would sue. Besides, provisions in relation to circumvention devices do not permit fair dealing to be used. Therefore, in such an hypothesis, the legitimate purchaser would have no mean of using his software. This is going further than the international trend and does not make a balance between the creator’s interests and the consumer’s.

- **47 D: interoperable products.** “Technical interoperability of software is required when a computer program has to be able to operate with another program in order to perform a particular function”\(^\text{19}\). Where interface information is not available, it may be obtained through reverse engineering, which may occur either by black box or white box techniques. Black box reverse engineering techniques use only the documentation related to the program and the behaviour of it, whereas white box techniques use the decompilation process, i.e. the decoding of the object code. This is a reason why in *Data Access*, the High Court could find infringement of the Huffman table, although no decompilation had occurred. It was a case of black box engineering, which I do not find however relevant because it is not in conformity neither with the spirit of the copyright protection (seeking to protect *expression* and should we recall that the source codes were different) nor with the encouragement that must be given to individuals to develop creativity. It is also true at the time of the case, interoperability provisions had not been enacted.

The reproduction or adaptation in that case is allowed for the purpose of obtaining information only to the extent reasonably necessary to obtain such information and to enable interoperability with the original or another program.

- **Error correction (47 E) and security testing (47 F).** A reproduction or adaptation may be made for the purpose of correcting errors or testing the security of the program. The concept of “good faith” is introduced for the doing of the security testing but no indications is given as to its meaning.

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S. 116(a)(7) which lists the “permitted purposes” of a circumvention device expressly referred to ss 47 D, E, F. In other word, it is expressly permitted to circumvent a device on a program for purposes of interoperability, error correction or security testing. That is to say that in case a lock has been implemented, the text does not allow the user to circumvent the device in order to make a back-up copy that would permit the use of the software – which seems to be the very first purpose of purchasing a goods - but well, the user could lawfully do it to test its security.

- **Fair dealing.** Some purposes known as “fair dealing” exclude infringement: “research or study” (ss40 and 103C), “criticism or review” (ss41 and 103A), “reporting news” (ss42 and 103B) and “judicial proceedings or the giving of professional advice by a legal practitioner or patent attorney” (ss43 and 104). The use must be genuinely made for that purpose and must also be fair. All relevant factors should be considered in deciding whether a use is fair dealing, including the portion being copied, the commercial availability of the material and the effect of the use on its potential market. It should be noted now that fair dealing rights do not apply in relation to works which have technological protection measures applied to them (infra).

The problem here is firstly, that fair dealing purposes are not quite well designed to be applied to computer programs, except for the “research and study” purpose, where one can think for instance of a student doing computer science and using a part of a program. Thus, they are a bit useless.

Secondly, in the case of “research and study” purpose, the fair use of someone else’s work is limited to a “reasonable portion” under s.10(1) of the Act. However, these provisions about reasonableness exclude computer programs, and nothing is said about what amounts to a reasonable portion for a fair dealing purpose in relation to a computer program. Does it mean that fair dealing purposes do not apply to computer programs or that the reasonable portion would have to be estimated by the courts, in the same way perhaps that the “substantiality” in determining infringement? Or shall we refer to a “reasonable portion” of works in *electronic form* as introduced by the “CADA”, although it does not specifically deal with software but is intended to be technologically neutral?

- **Government use of copyright material.** The Government may use copyright material without permission of the owner so long as it falls within the “services of the Government” and notification is given to the owner.

(iii) Moral rights

The *Copyright Amendment (moral rights) Act 2000* amended the 1968 Act by providing two new rights to the owner of copyright: the right of attribution of authorship and the right of integrity of authorship. It also introduced provisions relating to false attribution of authorship\(^{20}\). Although these rights have been enforced in other jurisdictions for a long time and do have more components in some jurisdictions (in European countries, pursuant to the Directive on copyright\(^{21}\)), their introduction in the Australian legislation resulted from a long process. As an illustration, in the French jurisdiction the “droit moral” of the author suffers some alterations in regard of computer programs. For instance, the author of a computer


\(^{21}\) Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society
program has a limited right of integrity (whereas for others works there is no restrictions) and the right of withdrawal which exists for other copyright works is absent for computer programs. In Australia, no restrictions have been expressed and so far there has not been any case law dealing with it. However, these rights frighten because they are seen as an obstacle from exercising economic rights or as a potential inhibition of the progress of art. However, s. 195 AWA of the Act provides that it does not amount to an infringement of moral rights to do an act which has been consented to by the creator of a work. The important question is whether an individual could completely give up his moral rights? This point has not been yet answered; nonetheless in France, courts have given response to this by ruling that contracts could not override these rights because they were expressly intended to protect the expression of the personality of the creator of a work. Considering the reticence of common law jurisdictions towards these rights, it is unlikely that a firm answer may be given shortly.

III. The uncertainties of the law

Infringement of a software occurs when a person, without permission, does or allows to do an act which is part of the exclusive rights of the copyright owner, as described above. It should also be noted that if the computer program has been made commercially available, the relevant licensing agreement may set out what permissions the copyright owner has given in relation to the way that program and any accompanying material is used. A few points need particular considerations.

§ “Reproduction” is not defined in the Copyright Act, but s. 14 refers to a “substantial part” of a work. Quantitative as well as qualitative considerations have been taken into account by the courts in establishing whether a substantial part of a work had been reproduced. It is a matter of facts. In Autodesk the look-up table, although not considered as a computer program itself, was a “substantial indeed essential part” of the Widget C program. Besides, it may be quite a dilemma to distinguish idea from expression in the case of a utilitarian work such as a computer program, which is “intended to be useful rather than to please”. Dawson J, in Autodesk, affirmed the application of the merger doctrine in this context:

Thus, when the expression of an idea is inseparable from its function, it forms part of the idea and is not entitled to the protection of copyright: Lotus Development Co v Paperback International (1990) 18 IPR 1, at p.25

§ Copying from the Internet is another main issue. If a person copies into his hard disk a software from the internet, does this amount to an infringement?

The Digital Agenda Act was intended to commence on 4 March 2001. This Act introduced a new right for copyright owners which is a right to communicate to the public. Notwithstanding the interpretation of “the public” (the “CADA” states that it includes the

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22 Patricia Loughlan, Moral Rights (a view from the town square), March 2000, Media & arts law review Vol.5 No 1
25 Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000, Attorney-General’s Department, note 2
public within or outside Australia, but does it have the same scope it was given in the Telstra case?), the doctrine is divided as to what constitute a “communication”. A copy from the internet could indeed very well fall within this new right.

Communicate means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter.

This right is intended to be technology-neutral, i.e. to cover a broad range of copyright materials (whereas before the amendments, the exclusive rights of the owner only extended to wireless broadcasts and cable diffusion services\(^{26}\) from broadcasting and cable diffusion to email, intranets and web publishing. According to the DCITA, “if a copyright work is included on a person’s website, broadcast or even emailed without permission, that person may be infringing copyright”. Another rationale for this new right was the difficulty of enforcing rights once a work had been digitally available. Therefore, it now allows to attack the person who first communicated the work. It is subject to the exceptions which apply normally to the exclusive rights. This right to communicate is also “provided in addition to the benefit of the new circumvention of technological protection measure provisions which aim to give a copyright owner an improved ability to use encryption, software locks and other technologies to prevent their works from becoming available to unauthorised recipients in the first place”\(^{27}\).

Circumvention devices are a new tool for copyright owners. The new communication right is subject to powerful enforcement measures, including a civil cause of action for copyright owners against persons who make or commercially deal in circumvention devices. There are also criminal penalties for certain conducts.

Under s.10, a circumvention device is:

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a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure.
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A circumvention service is defined in similar terms.

The use of circumvention devices is not proscribed, only certain commercial conducts are: the Digital Agenda makes it an offence (s.116A) to produce, commercially deal in, import, advertise, market or make available online devices, or to provide services, used to circumvent technological protection measures. The prohibition applies where a work or subject-matter is protected by a technological protection measure and if a person does any of the acts without permission of the owner or licensee, and if the person knew or should have known that the device was intended to circumvent or facilitate the circumvention of a protection measure. As it has been noted above, the enforcement of these measures are subject to exceptions, if the user can rely on a permitted purpose, which include ss 47 D, E, F for computer programs. Nevertheless, this concession was not extended to fair dealing purposes; as a result copying for fair dealing purposes after circumventing a device would be an infringement. Therefore, “users may find their fair dealing rights of little practical value”\(^{28}\).

\(^{26}\) Ross McLean & Anne Flahvin, Aspects of the new right to communicate, Cyberspace Regulation: e-commerce and Content seminar, UNSW CLE Seminar 2001

\(^{27}\) note above

\(^{28}\) note above
As an author observed\textsuperscript{29},

It is suggested that if fair dealing was allowed in relation to digital works, it would conflict with the normal exploitation of the work. […] fair dealing in a digital environment would run counter to commerce, because a part will be a separately saleable commodity in the digital world. How can that be fair? The fair use provisions are supposed to be such that the activity does not destroy or disturb the normal exploitation of the work by the copyright owner.

§ Rights management information.
There are new criminal offences and civil remedies in regard of the intention removal and alteration of rights management information (RMI), i.e. sanctions against tampering with electronic RMI, and against distributing or commercially dealing with material whose RMI has been tampered with. RMI is information attached to or embodied in digital material that identifies the material and its author or copyright owner, or which relates to the terms or conditions of use”. It typically includes details about the owner of copyright, the terms and conditions of use of the protected material.

IV. The overlapping of contract law: a foreseeable death for copyright?

In the digital environment, works are more difficult to protect and the Digital Agenda Act aimed at offering solutions. Nonetheless, a part of the doctrine thinks the Digital Agenda Act still does not balance interests of the parties:

whereas copyright has traditionally been concerned to control copying of protected works, the focus in respect of material distributed electronically has shifted to controlling access\textsuperscript{30}.

The enactment of new measures, such as the right to communicate, indeed restrain access to works by making rather uncertain situations where individuals may lawfully exchange with others information they find interesting. It seems that on the Internet, copyright owners want ‘the butter and the cream’ i-e they wish to make their works available online in order to gain some publicity and benefits from it but they also want people not to use their works. If in a copyright point of view it is understandable, it is not also forgetting that what has been called the “information superhighway” was intended to be a fantastic medium of exchanging information?

Some other authors have proposed to take a number of steps in order to prevent unauthorised copying on the internet, such as including a copyright notice on the work (even though it is not required to obtain protection) in the form of © 2002 Name of the owner, use of technical protection measures, inclusion of unique identifying code in the software, hidden watermarks or time bombs\textsuperscript{31}. However, problems of efficiency in protection are still very accurate and the debate concerning a more adequate protection off and online focuses on contracts. A major issue is whether contract law could eventually override copyright law, whether it would be more adequate than copyright protection. Once again, if it may be an efficient tool offline in a world where distribution might be controlled, contract law is likely to be rather useless online.

\textsuperscript{29} Brad Sherman, Digital property and the digital commons, unpublished h.sherman@mailbox.gu.edu.au

\textsuperscript{30} Ross McLean & Anne Flahvin, The Digital Agenda Act: how the new copyright law (and contract) is redefining the relationship between users and owners of copyright?, p.1 (emphasis added)

\textsuperscript{31} D B Webber, Going Digital 2000: legal issues for e-commerce, software and the internet, chapter 2
because of the absence of boundaries. Notwithstanding the delicate and classical question of the competent jurisdiction, what use could be made of a contract between two parties when, somehow, the work subject to the contractual provisions has travelled around the world? Yet, attempts at finding adequate solutions are being enforced, such as s.47H of the Copyright Act that states that:

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting the operation of subsection 47B(3) or section 47C, 47D, 47E, 47F has no effect.

These provisions were recommended by the CLRC\(^{32}\), who had particular regard to art.9 of the EC Directive on Computer Programs, that renders null and void any contract contrary to art.6 (decompilation), or to the exceptions provided in art.5(2) (back-up copying) and 3 (observation and study). Matters of public policy could also intervene to make invalid a contract.

However, it does not appear that all issues have been cleared for, in June 2001, the CLRC published a report on “copyright and contract”, an after public submissions a conclusion was ought to be published in April 2002 (unfortunately it has not been made public yet).

A main issue is whether a contract overriding consumers’ protection legislation would be valid: in Europe, consumers’ protection is of great concern; what would be the situation before the Australian Courts?

**Conclusion**

It appears at least ludicrous that a 50 or 70 year protection period is granted to software, for software are being developed, improved, adapted so quickly. Thus the current copyright protection does not meet the stakes of the Information Society. Would not it be more appropriate to go back to the idea of a *sui generis* protection, because the subject matter is specific and cannot fit into the protection originally conceived for literary and artistic works?

Following the path open by the protection of databases in Europe?

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\(^{32}\) CLRC, Copyright and Contract, 2001, p.19
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Nota: complete references are given in footnotes

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- G50 “Computer software and copyright”
- G51 “Owners of copyright: how to find”
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