

Be careful not to step into copyright doo!

Intellectual property is inherently mercurial. There are however some fundamentals, which underpin the statutory regimes and provide a survivor kit for those applying the concepts to the many diverse situations.

The failure to “check the chute” led to one unfortunate experience in a matter in the West Australian Supreme Court.

A software programme as confidential information

The case involved the transit coach industry. A large West Australian coach company (Feature Australia), had a software programme (COBS), written to assist in making bookings and rostering its coaches and drivers. The CEO of that company, whilst visiting a former employee, who had commenced work with a competitor (International), noticed a spreadsheet roster in the form produced by COBS.

The matter wasn't raised for fear of putting the employee and the competitor on notice. Instead it crystallised as an application to the court for pre-action discovery. Initially, the basis of the application was that there was evidence that might lead to an action against the employee for breach of confidence or breach of fiduciary duty, the confidential information being COBS.

Such an application required reasonable enquiries to be made. As stated the applicant didn't make any, explaining that any enquiry risked the evidence being destroyed. The respondent opposed the application on the ground that reasonable preliminary enquiry was not made.

The explanation

The employee gave evidence that upset the footing upon which the application was initially made. The employee said that after he joined International, he wrote to the programmer who wrote COBS to see if he could write a programme for International. He was advised that he had not granted Feature exclusive rights to COBS and quoted a fee to do so. Subsequently, a similar programme to COBS was made for International.

In such circumstances, the applicant abandoned the breach of confidence ground and brought the application on the basis that it may have a cause of action against the respondent for infringement of the applicant's copyright in COBS.

The problem

The problem was that the copyright cupboard was bare.

Under the *Copyright Act 1968* (Cth) (Cth), computer programmes are protected as literary works (see s.10). Pursuant to s. 35(2) of the Act, subject to certain exceptions copyright in a literary work vests in the author. The exceptions include where the literary work was made by the author pursuant to the terms of a contract of employment. In that case, subject to any agreement, copyright vests in the employer. The programmer wrote the programme under a contract for service, a contractor not an employee.

In the absence of any evidence that Feature had copyright in COBS (or exclusive rights to it) and in the light of the admission that the applicant hadn't turned its mind to copyright ownership because of the confidence issues, the application was dismissed.

Feature Australia Pty Ltd v International Stage Lines (Master Newnes, 22 July 2003)