



Computer program backups and the Copyright Act

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A recent Australian Court decision has provided a useful clarification of the law under which users may make backups of computer programs.

The Australian and New Zealand Copyright Acts both expressly permit the copying of computer programs for backup purposes (referred to in this article as the “backup provisions”). Section 80 of New Zealand’s Copyright Act 1994 allows a lawful user of a computer program to make a backup copy of the program for the sole purpose of being used:

- In place of the original in order to preserve the original copy; or
- If the original is “lost, destroyed, or rendered unusable”.

Section 43C of the Australian Copyright Act 1968 is of similar effect.

These backup laws were enacted when computer programs typically existed and were delivered on removable media such as floppy disks and tapes. However, they are equally applicable to the copying of programs on hard disks and other media, as well as programs in-memory.

Unsurprisingly, allowing users to make a legitimate, “traditional” backup (such as on a backup tape) has proven uncontroversial. It is often necessary to make full copies of computer programs in order to maintain a reasonable backup regime. In many cases would be uncommercial and unreasonable for licensors to demand a new licence be obtained for each backed-up program.

However, what is the position of a user who makes (and occasionally tests) a full offsite

replica of their system as part of comprehensive Disaster Recovery solution? This was one of several questions that the Australian Courts recently considered in the case *Racing & Wagering Western Australia v Software AG (Australia) Pty Ltd*¹ (the “RWWA case”).

In the case, the Racing Board (“RWWA”) had licensed an expensive (over two million Australian dollars) mainframe-based computer program from SAG. The program was used to process betting data and was considered mission-critical. The RWWA contracted a third party service provider to set up and maintain a fully operational replica of the system at a separate location. This necessarily involved copying the original program and related configuration data.

Importantly, the offsite replica system was not usually turned on. It was a “cold site”, meaning that while data was regularly copied to the offsite location, the replica system would only be used if and when a disaster affected the original system. This is in contrast to a “hot disaster recovery system”, in which the replica system is always running as a continuously synchronised stand-by version of the original system and can

¹ [2008] FCA 1332. On appeal: *Software AG (Australia) Pty Ltd v Racing & Wagering Western Australia* [2009] FCAFC 36.

seamlessly take over in the event of the original failing.

SAG claimed that by replicating the system (and thereby the SAG computer program), the RWWA had breached both the licence agreement and the Copyright Act, and needed to pay for a second licence. The RWWA counter-claimed that it was entitled to copy the computer program for the purpose of maintaining an offsite replica backup, under both the licence agreement and the backup provisions of the Copyright Act.

The licence agreement

The licence agreement stated:

Clause 12.3: Software AG hereby expressly authorises the Licensee to copy the System(s) (in object code only) and the Documentation for archival or emergency restart purposes PROVIDED THAT no more than (3) copies made by the Licensee of the then current system version shall exist at any time and all old versions shall be destroyed.

The licence agreement also provided that the program could only be “used” in a single authorised location – namely at RWWA’s headquarters.

The RWWA contended that clause 12.3 permitted it to set up, maintain and test an offsite replica system for the purpose of disaster recovery, despite the geographical restriction on the “use” of the software.

SAG contended that clause 12.3 only allowed copying of the unconfigured software from the original installation media, not the system as installed and configured on the mainframe

The Court rejected SAG’s contention. The Court found that the reference to “copy the System” must mean the system as installed and configured on the mainframe. It would be inconsistent with the purpose of enabling an “emergency restart” of mission-critical software if, in the event of an emergency, the

RWWA had to install and configure the software from scratch (which expert evidence said would take about one week).

SAG also contended that even if clause 12.3 did allow the “copying”, it did not allow the RWWA (or its services provider) to actually test the offsite replica system (which it had on done on several occasions), as this would be to “use” the system at an unauthorised location.

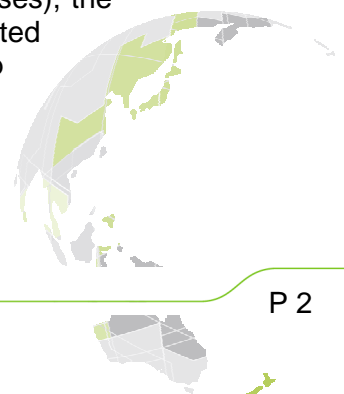
The Court rejected this argument as well, on the basis that performing an occasional test of a replica backup system did not constitute “using” the software within the meaning of the licence’s geographic restriction on use. The Court also accepted expert evidence that testing a backup was an important part of a backup regime, and was therefore permitted under clause 12.3.

These finding were upheld on appeal. The appeal Court agreed that the purpose of clause 12.3 included the making of an offsite replica backup, and that it would be “unreasonable and inconvenient” if the RWWA was not able to occasionally test the replica.

Copyright Act

Although the primary Court found that the RWWA’s remote offsite replica was authorised by the licence agreement, it also considered whether it would be allowed under the backup provisions of the Copyright Act. This was the first time an Australian or New Zealand Court had considered this issue in any detail.

The Court found that because the RWWA had copied the computer program (by replicating the entire system) for the purpose of being used if the original was damaged (i.e. for backup purposes), the copying was permitted under the backup provisions of the Copyright Act. It also found that the backup provisions



permitted occasional testing of the backup, based on the expert evidence that testing of backups was best practice, which was within the legislative intent of the backup provisions.

Therefore, even if the licence had not permitted the RWWA to copy or test the computer program, the copying and testing involved in the offsite replica backup was nevertheless authorised by the backup provisions of the Copyright Act.

While the appeal Court found it unnecessary to expressly consider the backup provisions of the Copyright Act, it did not modify the primary Court's findings on this issue and dismissed this part of the appeal.

[The Courts also considered other claims and sections of the Copyright Act beyond the scope of this article.]

Key factors

A key factor in the decision was that the replica system was a "cold site": besides occasional testing, it would only be turned on and "used" in the event of the original system being damaged. The Court's decision would almost certainly have been different had the replica system been a "hot site" (i.e. a live, real-time fail-over replica of the original system) as that would have involved an actual "use" of the backup copy beyond that permitted by both the licence and the backup provisions of the Copyright Act (which only permits use in lieu of the original).

Another key factor is that the licence did not expressly prohibit the RWWA from creating an offsite replica backup. In fact, the Court found that the license implicitly permitted that to occur. However, if the license had expressly disallowed such use, the RWWA's actions would have breached the licence.

In such a situation, it would not matter that the backup provisions of the Copyright Act permitted the copying, as the RWWA's actions would have been a breach of the licence (i.e. a breach of contract) even though not an infringement of copyright.

The New Zealand position

While a New Zealand Court would likely come to the same commercially pragmatic decision on interpreting the licence agreement as the Australian Court, what would the position be under the similar section (section 80) of the New Zealand Copyright Act 1994?

Section 80 permits copying of a computer program if it is made "*solely for the purpose of being used ... if the original copy is lost, destroyed, or rendered unusable*".

New Zealand law requires that a "fair, large and liberal construction" be applied to legislation (despite this phrase being omitted from the Interpretation Act 1999, it is still the approach to be applied: *Combined Rural Traders Society Ltd v Batcheler*, [2009] NZAR 208). Under this method of construction, a New Zealand Court is likely to arrive at the same result as the Australian Court in the RWWA case.

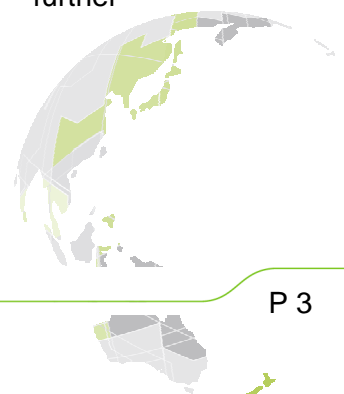
On this basis, copying a computer program by the lawful user for the purpose of maintaining an offsite backup replica will not, of itself, be an infringement of copyright.

However, section 80 contains an important exception not found the corresponding Australian section. Sub-section 80(3) states that the right to make a backup copy does not apply where it would be:

"Contrary to an express direction by or on behalf of the owner of the copyright in the computer program given to the lawful user of the original copy not later than the time when the lawful user of the original copy acquired that original copy."

Sub-section 80(4) further states:

"A reference to an express direction, in relation to a



copy of a computer program, includes a reference to a clearly legible direction printed on the copy or on a package in which the copy is supplied.”

Therefore, if the licensor expressly directed that a backup copy may not be made, the licensee could not take advantage of section 80. It is clear that a contractual restriction on backups would constitute a “direction” for the purposes of section 80(3).

On the wording of section 80(3), the “direction” could, presumably, contain conditions or allow only specific types of backup. For example, the direction could allow a backup to be made on removable media, but not installed, tested or used in any off-site replica system.

Conclusions

The RWWA case involved considerable input from a number of IT expert witnesses. It highlights a Courts readiness to accept and take into account expert evidence as to IT industry best practices when considering the intentions behind an IT-specific law.

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Licensors need to make sure that the permissible backup uses of their computer programs are clearly set out in the licence. It is not enough to simply rely on defined restrictions on “use” to restrict how a user may copy and test the system for backup purposes. A licensor who wishes to prevent a customer from maintaining a replica system backup as a “cold site” should clearly state this under the licence.

Licensees should ensure that software licence terms permit the particular form of backup that they wish to employ. It is also necessary to check any notices, labels or other “directions” *outside* of the licence terms, which purport to limit the licensee’s right to make backups. These directions could include clear statements on a website, or in a “readme” file, provided that the direction is “given” before the licensee acquired their licence.

In the absence of any licence term or pre-licence direction to the contrary, users are able to copy computer programs to maintain a “cold site” backup replica of their system.

