



“... creating your IP solutions”

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‘SMART MONEY’ TO THE TUNE OF \$750,000

Introduction

Many of us have experienced the impact of computers to our respective practices or positions, in short we have seen the evolution of manual, to word processing equipment to the PC unit. The law has sought to respond to this ‘information explosion’ by making existing principles applicable in a digital environment and also to create *sui generis* law such as the *Copyright Amendment (Digital Agenda) Act 2000*.

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Characteristic of an evolving process, matters arise which slip through the cracks, no matter how small those cracks may be.

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Recently, a judge of the Supreme Court of Queensland addressed in my view, one of those matters in respect of a table of information relating to horse race betting, which appeared on a screen display. It was alleged that the copying of the display on the computer screen was a copyright infringement.

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Background

The plaintiff

The plaintiff sold computer programs which enabled horse racing and greyhound punters to place wagers online. The program was introduced with a view to increase the chances of placing a winning wager. It sought to achieve this by arranging information obtained from the Seven Network, which broadcast information it in turn had derived from totalisator betting agencies (TAB) of Victoria, NSW and Queensland.

Access to the information was available following acquisition of a decoding device to receive the coded signal and payment of subscription fees. The information which was available in a table form included:

- the time and place of each race;
- the distance of the race;
- the track condition and weather;
- the horses (or dogs) entered to run each race;
- the names of scratched horses (or dogs);
- the identity of the rider; and
- the horse's track history.

The program

The program however did not assist pick winners by reference to the track, the rider or the horse. The relevant information for the program was the amount of money placed and the horse upon which it was placed. More particularly, it was a fundamental principle of this program that there existed an identifiable factor known as 'smart money'. It was considered that there existed a body of persons who, because of 'inside information', had an advantage over punters generally. As a result of this advantage, wagers could be placed immediately before a race. This fluctuation in betting was transmitted by the Seven Network without comment, but was a factor influencing the users of the program, who followed the 'smart money': [9].

The managing director of the applicant (Rees) conceived the idea of following the 'smart money' and wrote the specifications for a program. A computer programmer was retained to write the source and object codes. Rees also wrote a training manual to explain the operation of the program. The program underwent many revisions until 2000 when a program was written which complied and fulfilled with the plaintiff's specifications.

Relevantly, the program produced a visual display on the screen which used colour codes and a setting out described by the plaintiff's evidence as 'not the typical way'. An example appears at [17] of the reasons.

The defendant

The first defendant was a computer programmer who had an interest in horse racing. The first defendant carried on a business of selling “a computer program remarkably similar in function to the plaintiff’s”: [28]. An operating manual was provided with the first defendant’s program which was “astonishingly similar” to the manual Rees wrote. A printout of an example of the first defendant’s screen was reproduced at [28] of the reasons.

The plaintiff did not allege copyright infringement of the source code, object code or the sequence of bits causing the plaintiff’s program functions. The plaintiff alleged copyright infringement of the manual and the ‘work which appear[ed] on a computer screen generated by its computer program’: [77]. In respect of this second allegation, it was claimed that the first defendant set out by means of a different program to replicate the functions of the plaintiff’s program in order to produce a screen display which was a substantial reproduction of the plaintiff’s screen display.

Decision

Chesterman J determined that the plaintiff did not make out its case for copyright infringement of the screen display. His Honour considered that whilst there was similarity between the respective screen displays such as the framework and the identical colour codes, this did not arise from copying of the plaintiff’s computer program.

His Honour did find that the plaintiff succeeded in its claim for infringement of the manual which accompanied the program. In assessing damages, Chesterman J did not accept the plaintiff’s expert evidence who calculated that every sale made by the first defendant meant the loss of a sale to the plaintiff. The figure the plaintiff’s expert calculated was in the sum of approximately \$953,000. This was reduced to \$760,000. The calculation was based on acquisitions by the first defendant of decoding boxes which would be issued to each new customer.

