



IP Policy and Practice Seminar 2004 – Case study:

Episode 1 – Dodgy Data and the Mediwise Project

Guidance for participation in the Case Study

The Case Study consists of 6 numbered fact scenarios. The scenarios are part of an unfolding sequence of events relating to the one project, called 'MEDIWISE'. Each scenario will raise a range of IP issues. You are asked to identify and discuss those IP issues.

Please read the scenarios carefully, reading between the lines as appropriate. Not all the issues are signposted in an obvious way.

Please try to confine yourself to *IP* issues. You may see issues in other areas, eg privacy, procurement, probity, etc. You may note these issues, but the main focus should be on IP.

Each Syndicate will be assisted by a Facilitator. The Facilitator may occasionally steer discussion towards issues, and will be responsible for monitoring time. You have 10 minutes on average to discuss each scenario.

It is *not* the role of Facilitators to fill in any gaps that you may detect in the fact scenario, or to expound the law. Note down what needs to be explored, and why. As appropriate make plausible assumptions to enable discussion to proceed. Identifying the questions to ask is more important than knowing all the answers. In some cases the answers will emerge in later scenarios, or at the end.

The facts described in this case study are fictional. The legal issues are real.

Setting

The Government has been concerned for some time about the problems associated with fragmentary health records. The Health Records Authority (**HRA**) has just been established to administer a scheme called '**MEDIWISE**' under which each patient's medical data (treatments, prescriptions, donor status, etc) can be consolidated to improve health care delivery. It will be an 'opt-in' scheme.

Participating individuals will be issued with a smart card (the **MEDIWISE card**). Their medical data is stored both on the MEDIWISE card and on a central **HRA Database**. Data can be updated in either place, and synchronised from time to time as mentioned below.

The MEDIWISE card is designed to slot into a special read-write device (called the '**MEDIWISE-RWriter**'), which can be connected to any standard computer in hospitals, doctors' surgeries, pharmacies, etc.

When the MEDIWISE card is inserted into the MEDIWISE-RWriter by a health professional, medical data can be read on screen, and new data can be stored on the card (eg, a prescription that has just

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The material does not constitute legal advice. For any important matter you should obtain appropriate professional advice relevant to your circumstances. The facts described in the Case Study are fictional and any resemblance to individual agencies or persons is coincidental. The legal issues are, however, real.

been issued). If the health provider's computer is online at the time, it is possible to synchronise data between the HRA Database and the MEDIWISE card.

Health professionals performing these operation are issued with a distinctive **MEDIWISE Provider's card**.

The central HRA Database is being developed under a systems integration contract with an IT service-provider, Dodgy Data. The system includes a module called '**Talk2Me**' which is critical to the synchronisation of data between the HRA Database and MEDIWISE cards.

Dramatis Personae (in order of appearance)

- **You**: you've just joined HRA as a project officer, with a reputation as a hotshot on IP (based largely on your experience developing a commercialisation strategy for a donut and coffee chain).
- **Bruce**: your boss. In appearance and demeanour he reminds you of Donald Trump (of 'The Apprentice'). Trevor says that Bruce was a political appointee.
- **Phyle Crunch**: legal advisor. Grumpy, but generally 'sound'. Trevor says he used to work in IT and made his name working on file compression algorithms.
- **Dodgy Data**: systems integrator. Responsible for development of HRA Database and communications elements of the MEDIWISE system.
- **Aggressive Systems**: software company that you never heard of before. Based in Delaware.
- **Trevor**: been around forever. Will tell you a lot of stuff, if you ask him.
- **Mary**: solid and loyal. Panics.
- **Theodore**: graphic design consultant. A subcontractor to Artifice Pty Ltd. A bit of a prima donna.
- **Artifice Pty Limited**: website developer. Responsible for building the HRA website.
- **Peta**: volunteer patient whose case study may be used in the advertising campaign. An aspiring musician.

NOTE: an index of legal concepts addressed in this Case Study appears at the end.

1. The aggressive letter (in which we are thrown in at the deep end)

You have just joined the HRA on secondment. Bruce has heard about your reputation as an IP hotshot. He calls you into his well-appointed office and practices putting into a large 'World's Greatest Boss' mug while he tells you there might be a few small IP issues that need to be managed carefully in implementing the MEDIWISE scheme. But he's not one to give clues.

Just before rushing off to Senate Estimates, Bruce asks you to have a look at a letter he has received from a US firm called Aggressive Systems. The letter says (in part):

Talk2Me incorporates our proprietary algorithms, process and know-how which will be established by pending litigation. However, in a spirit of compromise and not wanting to undermine the continuance (sic) of your business operation we have attached a draft licence agreement, for execution by you within thirty (30) days.

Failing that . . . etc, etc

Signed
Chuck A Wobbleigh (President)

The draft licence is expressed to be between 'Aggressive Systems™ (Licensor)' and 'Commonwealth of Austria (sic) (Licensee)'. It provides for the Licensee to pay a licence fee of US\$4,500 per annum in return for which:

. . . Licensor releases Licensee from all liability in respect of infringements of Licensor's proprietary right.

Naturally you check the terms of the contract with Dodgy Data to see what the IP position is in relation to the Talk2Me component that was included as part of the deliverables. The contract requires Dodgy Data to grant or procure a permanent, irrevocable, royalty-free, worldwide, non-exclusive licence for HRA to use, reproduce adapt and exploit any background IP¹ as part of the MEDIWISE system.

Trevor believes the Talk2Me module is available under an 'open source' software licence and HRA may even have a licence already.² However no one can locate any documentation.

Mary says we should just pay Aggressive Systems now because the letter implies that if they succeed in the litigation they will charge a higher licence fee.

What do we say to Aggressive Systems?

Panicking is not the answer, unless you want to spend public money to fund their litigation. We could write back asking them for better particulars of the subject matter in which they claim IP rights, when and by whom it was developed, the nature of IP rights subsisting, and the path by which those rights come to be vested in Aggressive Systems.

In several respects, the letter is confused and clumsy and does not instil conviction about the nature and validity of their claim. For example: they do not make clear whether the IP claimed is code (copyright), a business process (potentially patentable), confidential information or merely an algorithm (not protectable in itself). They give no detail about the pedigree of their IP (whatever it might be). Note that they give a release in respect of HRA 'infringements' of their rights, but no warranty about the

¹ This includes the 'Talk2Me' module.

² You have heard that government policy favours use of open source software. What must be balanced is that open source software often doesn't contain warranties about either IP or the quality of the code.

extent of those rights, nor an indemnity against the possibility that another party may make a claim against HRA. Not to mention spelling and grammar!

What do we say to Dodgy Data?

They may be in breach of contract obligations if they are not entitled to grant the licence which they have purported to grant. You could raise the letter with them and seek their comments.

Any checks to be made with the escrow agent?

We could check if any source code was put into escrow.³ This and other factors may affect the overall strength of our position, and the options available to us in dealing with the two companies.

What IP subject matter may be involved in implementing the MEDIWISE scheme?

- the data itself
- the central system software
- any circuit layouts that may be contained in the MEDIWISE RWriter
- any business process that may be patentable
- the visual design of the MEDIWISE card
- the name 'MEDIWISE' and any associated logo
- materials on the MEDIWISE website
- advertising material in both print and broadcasting media, etc.

Who are the parties that interact in development and operation of the MEDIWISE scheme (and why do we need to ask that question)?

You need to know this because IP issues may arise in a number of these relationships. Possibilities include:

- the software developer, Dodgy Data
- owners of any pre-existing software components that are incorporated into the system
- the manufacturer of the MEDIWISE RWriter
- graphic designers
- health professionals who input data
- not to mention the participants.

You should obtain copies and become familiar with the any relevant contracts that are in existence (especially IP clauses); similarly you should find out what further contracts may be created, eg a subscriber contract or 'terms of participation'.

³ Access to source code is necessary in order to maintain compiled software. Under an escrow arrangement the software supplier lodges source code with a third party (the escrow agent) who retains it in safekeeping so that if the supplier defaults or goes bankrupt and is no longer able to support the software the customer can obtain the source code and make other arrangements for maintenance.

2. The backstop (or ‘a beautiful little section’)

Dodgy Data have gone into a huddle with their legal advisers after you showed them the letter from Aggressive Systems.

While you are waiting for them to respond, Trevor suggests that you consider the government use provision in the Copyright Act (in case all else fails); the provision means the Commonwealth to use anybody’s copyright, and it can’t be prosecuted. You think this sounds too good to be true, and rush off to check it out while visions of performance bonuses dance in your head.

Section 183 provides, in part:

- (1) The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth . . . , or by a person authorized in writing by the Commonwealth . . . , doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth . . .
- (3) Authority may be given under subsection (1) before or after the acts in respect of which authority is given have been done . . .
- (4) Where an act comprised in a copyright has been done under subsection (1), the Commonwealth . . . shall, as soon as possible . . . inform the owner of the copyright, as prescribed, of the doing of the act and shall furnish him or her with such information as to the doing of the act as he or she from time to time reasonably requires.
- (5) Where an act comprised in a copyright has been done under subsection (1), the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth . . . and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal.

Does section 183 provide some additional comfort to HRA in relation to its continuing use of Talk2Me?

Section 183 may be of some value, though it has limitations:

- it only covers an ‘act comprised in a copyright’ (being the things that the copyright owner has the exclusive right to do). It doesn’t confer immunity in respect of any infringement of moral rights (being the personal rights reserved to the author). However this might not be major issue anyway, because moral rights are somewhat limited in relation to software.
- it only covers things done ‘by the Commonwealth . . . for the services of the Commonwealth’. For purposes of the *Copyright Act 1968*, is HRA to be treated as an ‘agent or emanation’ of the Commonwealth? Two things hinge on the answer:
 - whether HRA owns ‘its’ copyright or loses it to the Commonwealth. If HRA is equated to the Commonwealth for purposes of ss.176 & 177, then the Commonwealth (and not HRA) owns copyright in any materials created or first published by or under the direction or control of HRA
 - whether HRA has the benefit of section 183. If HRA is equated to the Commonwealth for purposes of s.183, then it can take direct advantage of the statutory licence that s.183 provides.⁴
- it only applies to acts done in Australia. This means that there would be immunity to the extent that use of Talk2Me is confined to Australia. Thus it may affect any later commercialisation plan.

⁴ Thus it seems that being the Commonwealth is a two-edged sword. However a consultation with Phyle Crunch might reveal some ways to get the best of both worlds. If HRA is the Commonwealth, you may want to ask about the possibility of a ‘Deed of Repatriation’ to legitimise HRA ownership. If HRA is *not* the Commonwealth, you might still get the benefit of the protection s.183 offers by persuading the Department of Health (who are well disposed to HRA) to ‘authorise’ HRA to use Talk2Me.

- s.183 is framed as a proposition that (if the conditions are met) HRA will not infringe *copyright*. But if we are bound by a licence agreement not to exercise the copyright beyond what the licence explicitly allows, we may be in breach of *contract*. Some licence agreements are framed simply as a licence; others include a licence plus an obligation not to do anything beyond the licence, and so the effect is to create a contractual bar to exercising your s.183 rights. You may want to check the licence offered by Aggressive Systems to see if signing it would sacrifice any s.183 rights.
- it applies only to copyright. (However there are similar provisions in the *Patents Act 1990*, the *Designs Act 2003* and the *Circuit Layouts Act 1989*.)

What about the policy implications re use of s.183?

- Use of s.183 would probably be justified in this case, because we have installed the software in good faith and are afflicted by a breakdown in the marketing process.

3. The meeting (in which trade mark issues surface)

At the Branch meeting you report on actions taken to deal with the letter from Aggressive Systems. You are rightly proud of your efforts, but Bruce is not the type to give compliments. He wants to talk about getting the MEDIWISE trade mark established.

'What trade mark?', you ask. He tells you that Theodore has just come up with MEDIWISE logo. Theodore shows you his design (done in an idle moment waiting for a bus). It consists of the word '**MediWise**' in Prussian blue, in a stylised font with capital 'W' as shown. The word is enclosed by a pair of hands reaching upwards. Bruce thinks it will make a 'great' business logo. Bruce wants to use the logo on MEDIWISE cards, on the website on stationery, fridge magnets and seemingly anywhere else it will fit.

You ask if anyone has checked to see if the proposed logo encroaches on existing trade marks. Bruce says the legislation establishing HRA refers to the scheme as 'MEDIWISE', so use of the word surely can't be a problem. Theodore says the graphic elements were entirely his work, not copied from anything (and one thing about IP he does understand is that as long as you don't actually copy someone else's IP then you're OK). Bruce says we need to resolve the logo soon because the MEDIWISE scheme is to commence in less than 3 months.

From your time selling donuts, you have definite views about the attributes required of a good (legal and effective) trade mark. List those attributes

- a trade mark needs to be *distinctive* in relation to the goods and services to which it is applied.⁵
- is the imagery appropriate?⁶
- it should be readily recognised and remembered
- it should not be deceptively similar to any other mark that is registered in relation to the same goods or services
- it should be able to be rendered at a variety of in a variety of media, eg on letterhead, billboards, a smart card, on a website, etc.
- it should be able to be rendered attractively at different scales, and on different devices.⁷
- is it simple enough to be compressed to a bitmap that will transmit efficiently?

Is Theodore right about the difference between copyright and trade marks?

No. When a trade mark is registered you are legally on notice of the mark, and cannot use or register a similar mark in relation to the same goods or services.

What searches do we need to make?

Before we adopt the MediWise logo, we should ask Phyle Crunch to arrange for a full trade mark search and analysis to be done. This will involve a search of the Trade Marks register to identify deceptively similar marks. It would also include searches of the world wide web, the Australian company and business names databases, popular domains (.com.au, .net.au and .com, etc) and telephone directories to identify use of the mark by parties who have not sought trade marks registration.

⁵ It seems unlikely that the image of hands reaching up in the MEDIWISE logo is unique. You suspect it may already be used in various forms by the Christian Bible Association and other organisations involved in 'caring'.

⁶ What do the hands in the MEDIWISE logo signify?

⁷ Do the hands reaching up start to look like a wineglass when faxed or printed in black and white!?

What might be the implications of the legislative provisions mentioned by Bruce?

You should check the legislation establishing HRA to locate the provisions mentioned by Bruce. It is likely that those provisions:

- confer on HRA the right to use the name 'MEDIWISE'
- preserve concurrent rights for existing users of similar marks⁸
- prevent any new users of similar marks.

If so:

- are there still advantages in our registering? Probably yes, because it puts people on notice of the existence of our rights.
- should we buy out the holders of preserved rights? Probably yes, if it is necessary to avoid confusion.

Should our trade mark be registered as a conventional mark or a certification mark?

- the 'MediWise' logo as used on the MEDIWISE card is probably a conventional mark
- however if the logo used on the MEDIWISE Provider's card is slightly different, that could be registered as a certification mark because it attests to the status of the holder
- we might also consider registering the name 'MEDIWISE RWriter' (subject to any arrangements with the manufacturer).

What about Theodore?

This raises a difficult legal question about the relationship between copyright in a logo, and trade mark rights that arise when the logo is registered. You may also want to check Theodore's contract, as it appears development of a logo was not part of the services he is contracted to perform. We may need a formal assignment of rights.

⁸ To avoid 'just terms' issues.

4. The visit (you find issues with the website)

The website development team⁹ are located in a different building. Bruce rarely visits them because he has been heavily engaged in policy issues and spends a lot of his time in the Minister's Office. You decide to pay them a visit.

You have read the contract with Artifice and noted that it provides that IP in all 'Contract Material' vests in HRA. 'Contract Material' is defined as all material brought into existence in performing the Contract. There is also a clause which provides that any material brought into existence prior to the Contract does not vest in HRA; instead Artifice grants HRA a broad licence to use, reproduce, adapt and exploit that material. There is no provision for recording such material.

At the site, you encounter Theodore. He joins you in the office of Artifice's project manager. Your first question to the project manager is whether in the construction of the MEDIWISE website they have used (or propose to use) any pre-existing or third party IP. You are told that most of the website content is prepared by and obtained from HRA personnel. However, there are some categories of pre-existing or third party IP:

- The website includes images sourced from a clipart collection, which is a standard product to which Artifice has acquired a licence.
- Theodore adds that the website incorporates a number of stylised human figures symbolising navigational functions of the site, which he considers proprietary because he uses them on every job he does. He shows you an example - a stylised traffic policeman indicating main navigation screens. You note that this includes a small label 'Theodore ©' which links to his own website. You comment that this labelling seems inappropriate on a government website which should not be used to promote the business of a contractor assisting in its development. Theodore says he has 'moral rights' and should be acknowledged properly because of his unique style.

Any issues arising from the IP clause in the contract?

The contract leaves a potential middle ground, where the IP position is undefined, ie, material that is developed after the Contract, initially for some other purpose, which is then applied or incorporated as part of the deliverables. Another deficiency is the failure to provide for an IP register or some notification mechanism where 'background IP' is incorporated in the deliverables. This would enable HRA to distinguish the subject matter it owns from that which is merely licensed to it.

What about the clipart?

You might ask to see the clipart licence agreement to ensure that the licence is broad enough to allow Artifice to use the clipart images in a commercial deliverable (such as a website), not just for personal or in-house use. Alternatively you might be happy to accept assurances from Artifice that they have procured a sufficient licence.

NB: it is best to do one or the other, not a bit of both - checking the input licence agreements involves an assumption of responsibility and may be construed as a waiver in respect of any deficiencies that later come to light.

What about the stylised navigation figures?

You should stick to your guns. As a starting proposition an author has a moral rights, including a right of attribution. But it is not necessary to attribute a work where non-attribution is reasonable in all the circumstances.

⁹ Artifice Pty Ltd

5. Planning for the launch (in which we learn about clearances and personality rights)

The next Branch meeting is taken up with discussion of the MEDIWISE launch, at which the Minister will officiate. The launch has been brought forward because of an expected election, and is now less than a month away. It will be an embarrassment if the website is not completed, or the advertising campaign is not ready to roll -'Its the ad campaign or my head, but one of them's rolling out' Bruce says. Mary shrinks into a corner.

To give the campaign a human face, it is proposed to use real life individuals (**volunteers**) whose medical stories can be used as vignettes in TV advertising, on the website and on brochures. The purpose is to reinforce the value of enrolling in the MEDIWISE scheme, particularly for younger people who may be inclined to be more casual about their health. Mary has been conducting a selection programme to identify suitable and willing individuals. She has come up with a short list. You are asked to work with her to ensure that any IP issues are appropriately dealt with.

Afterwards Mary shows you the shortlist of volunteers. Your attention is drawn to the CV of one person, Peta. She is a student at the Canberra School of Music, and lists the fact that she has recently undergone an audition for the next series of the Channel 9 program 'the Block'.

What sort of 'clearances' would you need to get from the volunteers?

- copyright: if the volunteers write down their stories for use on the website or in a pamphlet copyright will subsist in the story, and will vest initially in the volunteer. Do you need an assignment? Probably not. A licence should be enough, provided it is broad enough to cover the campaign *and* any consequential activities undertaken for record-keeping, accountability, audit or archival purposes.
- moral rights: it is important that there is a clear understanding between HRA and the volunteer about the extent to which their story can be edited.
- performers' rights: A person telling their story for a camera may constitute a 'performance' within the meaning of the performers' protection provisions of the Copyright Act. If Peta were shown singing a song that would definitely be a 'performance'. The Act requires that a performer's consent be given for any recording that is made. It is best practice to obtain the consent in writing.
- privacy: the vignettes will involve use of personal information from which they may be able to be identified. The volunteer should give an informed consent.

You should ask Phyle Crunch to draft a 'Clearance' document which can be used to obtain an appropriate consent, licence, clearance or waiver, as appropriate and legally effective for each category of right mentioned above. The form may include various warranties from the volunteer, including a warranty that their story will be true and not misleading or deceptive. You should check with Mary whether there were any conditions set at commencement of participation in the selection process. This might impact on the drafting of the 'Clearance' document.

You may also want to give consideration to a clause that would prevent a participant from using any public recognition flowing from the campaign in order to promote themselves in any media, as this might confuse the messages of the campaign.

The 'Clearance' form may need to allow for signature by a parent on behalf of any volunteer who is under age.

Any other issues?

You should check that the campaign arrangements comply with the *Guidelines for Australian Government Information Activities* established by the Government Communications Unit, which are available on the website of the Department of Prime Minister and Cabinet.

6. A Dodgy Proposal (or 'have we got a deal for you')

The marketing manager from Dodgy Data calls you to advise that they have procured Australian rights to the 'Talk2Me' module under an exclusive Distributorship arrangement with Aggressive Systems. This will therefore resolve the issue re the letter from Aggressive Systems that you raised with them some time back, he says.

The marketing manager then raises a completely new issue. He believes there are good prospects for commercialising the MEDIWISE system overseas. He has identified some prospects already, though details are commercially confidential. Dodgy Data want HRA to appoint it as exclusive distributor of the system. In return they would be willing to remit 20% of net revenues by way of royalties to HRA. Or they could provide the equivalent value in free maintenance of the MEDIWISE system.

You discuss it with Bruce who says a couple of Dodgy Data people accompanied the Minister on a trade delegation to China recently. Bruce notes the Minister is very keen to promote of Australian medical technology overseas.

Is the 'Talk2Me' issue now resolved, as Dodgy Data claim?

This depends on whether the licence from Aggressive Systems gives Dodgy Data all the rights that they are required to pass onto HRA under the systems integration contract. It would appear not, because the licence gives Dodgy Data Australian rights only.¹⁰

What commercialisation options are available?

Apart from a distributorship as proposed, options might include:

- assigning the IP in the system to Dodgy Data or another company for a one-off fee, retaining only a licence to use and improve, etc
- creating a joint venture with a commercial entity

When is the right time to look at commercialisation options?

There is no one answer. In an ideal world the commercialisation option might have been foreshadowed in the RFT under which Dodgy Data was selected.

Should we deal with Dodgy Data, or select someone else?

Depending on the RFT, it is likely that Dodgy Data was selected merely for its ability to develop and integrate the system, and there was no expectation that the system would be commercialised. Commercialisation involves a different skill set. There is a case for a fresh selection process before appointing anyone as distributor.

Your views on the proposed royalty structure?

There are many traps to avoid in granting a licence for periodic royalties (ie, a distributorship). A distributorship can give rise to an imbalance in incentives, or discontinuities over time in the way in which investment and effort compare with rewards

- where royalties are based on a percentage of net revenue, care needs to be taken to define (i) what revenue is attributable to exploitation of the system (as opposed to other deliverables that the

¹⁰ As mentioned in Scenario 1, the systems integration contract requires Dodgy Data to grant or procure a permanent, irrevocable, royalty-free, *worldwide*, non-exclusive licence for HRA to use, reproduce adapt and exploit background IP (including 'Talk2Me') as part of the MEDIWISE system.

Distributor might provide to a customer), and (ii) what is meant by 'net' (ie what overheads get deducted before arriving at a figure for 'net' returns)

- it may be necessary to prescribe a standard form of sublicensing agreement for the Distributor to use with its customers, so that there is a well-defined royalty base, ie a known transaction or deliverables on which royalties are levied
- there are risks associated with receiving services in lieu of royalties.

What are we going to do with the proceeds?

You may want to discuss the arrangement with the Department of Finance, if royalties are to be applied for as specific purpose (as opposed to going into consolidated revenue).

What happens if the Distributor develops improvements?

The product will not stay the same for ever. The Distributor will quickly find that its other customers require features to be added. That raises the question of who should own the IP in those improvements:

- if we allow the Distributor to own the improvements, they will have an incentive to develop the product away from the base product, thus diluting HRA ownership
- if the improvements are owned by HRA (in IP slang 'brought back to the hub') the Distributor and its customers will be disinclined to invest in improvements, especially towards the end of the distribution period.

Does HRA have legal power to engage in commercialisation?

This cannot be answered without looking at the legislation under which HRA is established. We should check to see what functions and powers it has, as that may have a bearing on its exercise of IP rights. The answer may be different depending on the form of commercialisation, eg sale versus distributorship.

There are a number of ways of managing all these issues. To ensure that the arrangement is properly structured and consistent with the legislative authority governing HRA, you would benefit from an *early* consultation with Phyle Crunch.

Denouement (in which loose ends are joined)

Peta: Peta was selected to have her story told as part of the publicity campaign. After some hesitation she agreed to the Clearance form you drafted, including the clause which prevents her from exploiting her public recognition in other media. As a result she reluctantly withdrew her application to Channel 9 to go on 'the Block'.

The 'Talk2Me' matter: After you wrote to Aggressive Systems asking for evidence of their claims in relation to 'Talk2Me' module, you heard nothing more from them, although you read that they were being counter-sued in the US by a number of parties. You got advice from Phyle Crunch that HRA is *not* the Commonwealth for purposes of the Copyright Act. However you have worked out a way to get the benefit of the protection s.183 offers by persuading the Department of Health (who are well disposed to HRA) to 'authorise' HRA (see wording of s.183(1)) to use Talk2Me.

Foreground and Background sorted out: After consultation with Artifice you worked out a scheme for recording copyright authorship and ownership details in the html metadata, so the **IP Register** is largely self-generating. This idea won a CEO's **Innovation Award**, under a new programme adopted on Bruce's recommendation for recognising staff who contribute to HRA's 'intellectual capital'.

The MediWise trade mark: The application for registration of the MediWise trade mark has been lodged, and following your request will receive expedited examination. The trade mark search revealed a charitable organisation which uses a similar (unregistered) logo. To avoid any confusion, HRA has agreed to recompense them their costs (estimated at \$50,000) involved in 're-branding'.

Bruce: Bruce resigned to contest the next election on a free trade ticket, shortly before the Launch.

The Launch: This turns out to be a fine success. Peta performs as a member of an instrumental quartet. The music performed is covered by an 'event licence' from the Australasian Performing Rights Association (APRA).

The Dodgy Deal: You note that the CEO of Dodgy Data spends a lot of time in conversation with the Minister. At one point you overhear them talking about another trade delegation to China. You get the feeling that on Monday the Private Secretary will be on the phone asking you to fast-track the distributorship arrangement.

You: However you won't be around to answer the call. Having seen off the other main contender, you have just found out that you have scored a place on the next series of 'The Block'. You resign next day. They will have to find someone else to handle all the intricacies of IP in future.

Index of IP issues dealt with in Case Study

IP concept / issue	Where and how it arises
accountability for public expenditure	an implicit issue with Mary's suggestion to pay Aggressive Systems before we have adequate detail of their claim - see Scenario 1
'acts comprised in the copyright'	the things a copyright owner has an exclusive right to do. Section 183 (described in Scenario 2) grants a statutory licence for the Commonwealth to do those 'acts'
background material	<p>material brought to an agreement or relationship by one of the parties</p> <p>in an agreement the service provider often retains IP in the background material, and the customer receives a licence (only) in relation to any background material included in the deliverables. See, for example, Scenario 1 (systems integration contract with Dodgy Data) and Scenario 4 (website development contract with Artifice)</p> <p>in Scenario 4 we consider the creation of an IP Register inter alia to capture details of the background IP</p>
certification trade mark <i>versus</i> a conventional trade mark	in Scenario 3 we distinguish a variant of the 'MediWise' mark which may be appropriate for this type of trade mark registration
clearance	<p>imprecise term</p> <p>Scenario 5 involves obtaining 'clearances' in respect of a range of legal rights (copyright, moral rights, performers' rights, privacy)</p>
collecting society	we learn of one example, APRA, in the Denouement
commercialisation	<p>whether it is permitted is often a key parameter of a licence. For example see Scenario 4 (the clipart licence)</p> <p>in Scenario 6 we consider a number of strategic choices re commercialisation of the MEDIWISE system, including a distributorship arrangement with Dodgy Data</p> <p>as noted in Scenario 6, Commonwealth bodies should consider their legislative or constitutional powers before entering into any commercialisation arrangement</p>
Commonwealth	<p>some statutory bodies are equated to the Commonwealth for purposes of the <i>Copyright Act 1968</i>.</p> <p>In Scenario 2 we consider the two-fold implications of such a conclusion. In the Denouement we learn that HRA is <i>not</i> the Commonwealth</p>
confidential information	<p>often relates to conflict of interest</p> <p>see if you can pick where these issues arise in Scenario 4 and the Denouement</p>

conflict of interest	often relates to misuse of confidential information see if you can pick where these issues arise in Scenario 4 and the Denouement
Contract Material	common term used to describe the IP subject matter created as part of carrying out a contract, ie. foreground material
custodianship	if it were not for the fact that we conclude that HRA owns copyright separately (see Denouement), the Department of Health would be the custodian of relevant health-related copyright on behalf of the Commonwealth
distributorship	a form of licence agreement, under which the licensee (distributor) is appointed to commercialise IP material; a distributorship is usually exclusive within the defined 'territory' in Scenario 6 Dodgy Data claims to have Australian distribution rights to the 'Talk2Me' module, and asks to be appointed distributor of the MEDIWISE system
escrow	in Scenario 1 we decide to check escrow arrangements for the 'Talk2Me' module which is part of the background IP under the systems integration contract
foreground material	in agreements often called 'Contract Material' in Scenario 1 we find that HRA owns IP in any foreground material created by Dodgy Data under the systems integration contract in Scenario 4 we find that HRA owns IP in any foreground material created by Artifice Pty Ltd under the website development contract in Scenario 6 we consider who should own IP in the <i>next</i> generation of foreground material (ie, created under a distributorship)
foreground <i>versus</i> background	in Scenario 4 we mention difficulties in interpreting an agreement where foreground and background are so defined as to leave a gap in the middle today's 'foreground' becomes tomorrow's 'background' for purposes of the distributorship contemplated in Scenario 6
implied licence	[no examples in this Case Study]
infringement	alleged by Aggressive Systems in Scenario 1, although it is not entirely clear what category of IP rights are asserted
IP Register	in Scenario 4 we consider the creation of an IP Register, <i>inter alia</i> , to capture details of the background IP. And see the Denouement
licence agreement	a so-called 'licence agreement' is proposed by Aggressive Systems in Scenario 1. Really only a release, as no warranty & indemnity given in Scenario 4 we consider if we should check the licence agreement relating to clipart used by Artifice Pty Ltd
licence <i>versus</i> contract	they are not the same. A licence can be granted as part of an

	<p>agreement, but equally may be granted unilaterally, independently of any agreement.</p> <p>In Scenario 2 we consider the interaction between the s.183 statutory licence (allowing copying) and a licence agreement purporting to bind you not to make copies</p>
moral rights	In Scenario 4 Theodore claims moral rights in his stylised navigational figures, but non-attribution may be covered by the 'reasonableness' defence in this case
moral rights <i>versus</i> copyright	Theodore may have moral rights in the logo, even if we obtain an assignment of copyright (and the right to proceed with registration as a trade mark) – see Scenario 4
open source	the policy position and merits of open source are mentioned in Scenario 1 (including footnote)
performers' protection	a personal right, not assignable. We should get clearances where a person's performance is recorded – see Scenario 4
policy issues	<p>policy re use of 'open source' software – see Scenario 1</p> <p>policy re exercising s.183 – see Scenario 2</p> <p>policy re Government advertising campaigns - see Scenario 6</p> <p>policy re competitive selection – see Scenario 6</p> <p>see also entries for 'accountability' and 'probity'</p>
probity issues	<p>probity issues arise from the relationship between the Minister and Dodgy Data– see Scenario 6 and Denouement</p> <p>see also entries for 'confidential information' and 'conflict of interest'</p>
release <i>versus</i> indemnity	the distinction is critical in assessing the terms of the Licence offered by Aggressive Systems in Scenario 1
royalties	<p>periodic payments under a distributorship, based on the volume of commercial activity</p> <p>in Scenario 6 we consider the merits of different royalty structuring arrangements, including the proposal by Dodgy Data that royalties be set off against their maintenance charges</p>
royalties <i>versus</i> licence fees	distinguished in Scenario 6
statutory body	some statutory bodies are equated to the Commonwealth for purposes of the <i>Copyright Act 1968</i> . In Scenario 2 we consider the two-fold implications of such a conclusion. In the Denouement we learn that HRA is <i>not</i> the Commonwealth.
statutory licence	an IP licence granted by statute (as opposed to given voluntarily). Section 183 of the <i>Copyright Act 1968</i> (described in Scenario 2) is an example.
subject matter	the letter from Aggressive Systems is vague about the nature of the IP

	<p>they claim - see Scenario 1</p> <p>in considering Scenario 1, we attempt to identify IP subject matters likely to be involved in the MEDIWISE scheme</p>
territorial application of the Copyright Act	in considering s.183, we are reminded that the Copyright Act only confers rights <i>in Australia</i> , and by the same token the exemptions and statutory licences in the Act apply only to copyright uses that occur <i>in Australia</i>
territory of a licence	<p>territory is often a key parameter of a licence (including especially an exclusive distributorship)</p> <p>Dodgy Data obtains distribution rights to the 'Talk2Me' module in <i>Australia only</i>, which seems too limited to support the 'worldwide' licence they purport to have given HRA for all 'background material' (which includes 'Talk2Me') – see Scenario 6</p>
trade mark	Scenario 3 deals with trade mark issues generally
trade mark <i>versus</i> copyright	we comment on aspects of the inter-relationship in <i>two separate</i> places in Scenario 3
waiver	checking the input licence covering clipart may involve a waiver of any defects in the licence – see Scenario 4