



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.

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The material is primarily designed for presentation, rather than to be merely read. Inquiries re conducting the Case Study may be directed to philip.crisp@ags.gov.au.

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.

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 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.

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?

What do we say to Dodgy Data?

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.

Any checks to be made with the escrow agent?

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

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

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?

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

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

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

What searches do we need to make?

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

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

What about Theodore's claims?

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

The website development team³ 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?

What about the clipart?

What about the stylised navigation figures?

³ 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?

Any other issues?

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?

What commercialisation options are available?

When is the right time to look at commercialisation options?

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

Your views on the proposed royalty structure?

What are we going to do with the proceeds?

What happens if the Distributor develops improvements?

Does HRA have legal power to engage in commercialisation?