

COPYING COMPUTER PROGRAMS

24 November 2017 | Australia

Legal Briefings - By **Philippa Bergin-Fisher**

It is a common story that an ex-employee or ex-business partner starts a new business, using a computer program which is alleged to be copied from the former business.

The recent decision of EIFY Systems v 3D Safety Services¹ is a reminder to businesses about the importance of taking pre-emptory steps to protect such intellectual property.

EIFY Systems (**EIFY**) provides web-based services, including an online safety induction program. 3D Safety Services (**3D**) provides web-based management systems. EIFY and 3D entered into a joint venture to integrate their offerings but this did not progress and 3D instead created their own online safety induction system. Although 3D had not accessed the source code of EIFY's program, EIFY alleged that 3D had copied the overall arrangement and look of its program. The Court found no copyright infringement, no breach of confidence and no breach of contract.

Four key points which arise from this decision are:

1. It can be difficult to protect computer programs and webpages through copyright, when only the structure or 'feel' has been taken. Copyright will not protect against someone taking the functionality or behaviour of a program.
2. Businesses should maximise their ability to protect computer programs and webpages through confidential information and contract. For example, consider:

- a. Who has access to bespoke computer programs?
 - b. Do the employment contracts of these people contain appropriate clauses on confidential information and IP? Do joint venture or other commercial contracts address confidential information and IP? Are there any important programs, or types of confidential information, which should be identified with precision?
 - c. Do the programs contain notices or terms of use about confidentiality? Do these notices sufficiently identify the confidential information?
 - d. Is the ownership position of confidential information and IP clear, especially where contractors or third parties have contributed to the program?
 - e. Is training provided which addresses confidential information?
2. It is not possible to prohibit a person from using information which is simply his or her accumulated knowledge, skill and experience in a field.
 3. Running IP infringement litigation is technical, and pleading and evidential problems can result in a lost case. In this case, for example, improper instructions to an expert witness led to the exclusion of his evidence, and failing to adequately plead the case meant that a key argument could not be run.

ENDNOTES

1. [EIFY Systems Pty Ltd v 3D Safety Services Pty Ltd \[2017\] NSWSC 1310 \(28 September 2017\)](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



SUE GILCHRIST
PARTNER AND HEAD
OF INTELLECTUAL
PROPERTY,
AUSTRALIA, SYDNEY
+61 2 9225 5221
Sue.Gilchrist@hsf.com



KRISTIN STAMMER
PARTNER, SYDNEY

+61 2 9225 5572
Kristin.Stammer@hsf.com



MILES BASTICK
PARTNER, SYDNEY

+61 2 9225 5722
Miles.Bastick@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close