Casenotes & Comments

APPLE COMPUTER INC. v COMPUTER EDGE PTY LIMITED

Briefly, the facts are that Computer Edge Pty Limited imported into Australia a micro computer labelled the "Wombat". This computer is similar in appearance to the Apple II and is marketed as being "Apple compatible". In fact, Apple alleged the Wombat is a copy of the Apple hardware and uses copies of the Apple firmware and software.

The first argument put by Apple was the similarities in appearance between the Wombat and the Apple and the fact it was advertised as Apple compatible constituted misleading and deceptive conduct under s.52 of the *Trade Practices Act.*

In other words, a prospective customer might, because of those facts be led to believe that the micro computer had in fact been manufactured or licensed by Apple. Sections 53(c), 53(d) and 55 of the *Trade Practices Act* relating to false and misleading conduct were also invoked.

Mr Justice Beaumont expressed that he had no difficulty in finding that even though the two computers were reasonably similar in appearance, they were clearly labelled differently and this meant there was no attempt to deceive. He went on to say the advertisement referring to the compatibility actually served to reinforce the distinction between the two machines.

A stronger argument put by Apple was that certain software (including that embedded in ROM chips) the source code at least, if not both the object code and the source code — used by Apple is subject to a copyright owned by Apple and that the Wombat infringed that copyright.

The Judge decided that there was no copyright in computer programs. His decision was based on his finding that neither the source nor the object code is a "literary work" within the meaning of the *Copyright Act.* He drew a distinction between "something which is merely intended to assist the functioning of a mechanical device and literary work so called".

In supporting his conclusion he found it significant that the *Copyright Act* was extended to make specific reference to films, sound recordings and the like at a time when computers had been developed and were well-known but made no reference to computer programs.

In his judgment, Mr Justice Beaumont considered that the following issues, at least, arise in determining whether copyright was available.

(a) Is it a "literary work" within the meaning of the *Copyright Act*?

(b) If so, is it an "original literary work" within the meaning of that Act?

(c) If copyright subsists in the alleged work, is the first applicant now and has it been at all material times the owner of this copyright?

(d) If so, would the making of the ROMs in the Wombat, if they had been made in Australia by the respondents, have constituted an infringement of this copyright?

(e) If so, was this known to the second respondent?

Unfortunately, having decided that none of the programs were literary works there was no need to test any of the other issues. Issue (d) may have proved particularly interesting had judgment been given on it.

In coming to this decision it seems that Mr Justice Beaumont saw the code written only in assembler and hexadecimal code. Any flow charts and the like and indeed the original program (in assembler) which included commentary on the various instructions, had been destroyed. Logically there is, of course, no difference between a program written in assembler and one written in a more readily understandable language such as COBOL but it is possible that the Judge was swayed by the seeming unintelligibility of hexadecimal code and assembler mnemonics.

The Judge distinguished the US case of *Apple Computer Inc. v Franklin Computer Corpn* in which it was found that not only is software copyrightable but that there is no reason to distinguish between source and object code and that a ROM is a suitable "tangible medium of expression". He declined to follow that case however on the basis that the decision was closely tied to the relevant US statute.

Two cases which he did not distinguish are *Northern Office Micro-Computers Pty Ltd v Rosenstein* (1981)(4) SA 123(c) and *Sega Enterprises Ltd v Richards* (1983) FSR 73. In the former case, the Supreme Court of South Africa held that a computer program was a literary work within the meaning of the relevant legislation. The legislation referred to is very similar to the Australian legislation. In the latter (English) case it was held that copyright subsists in an assembly code program and that the object code derived from it should be regarded as either a reproduction or an adaptation of the assembly code.

The effect of this decision is that for the moment, at least, there is no copyright protection afforded to sofware in this country. This is true of at least the code itself; the position with regard to flow charts and other expressions of software has not yet been determined. It is not possible to say how long this situation will continue. It is possible, of course, that the decision will be overturned by a higher court and an appeal has been heard by the Full Federal Court. A decision is expected shortly. A more certain and therefore preferable course would be for an addition to the *Copyright Act* or the introduction of a new Act which specifically affords protection to the authors of computer programs. The Attorney-General's Department has both courses under review, but from the comments of the Attorney General at the symposium on copyright, held in Canberra on April 15, it seems likely that the Government will not take action until after a decision has been handed down in the *Apple* case.

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