

APPLE WINS FIRST ROUND IN SOFTWARE COPYRIGHT CASE

Both Microsoft and Apple are claiming victory at the end of the first round of the user interface "look and feel" copyright case between the two companies. Apple also commenced proceedings against Hewlett Packard for breach of copyright associated with their user interface "New Wave".

The Wall Street Journal took the view that Apple won a "stunning first round victory" in this year old copyright suit, where Apple alleged that Microsoft and Hewlett Packard has misappropriated the "look and feel" of its Macintosh machines. Other commentators see the decision as being more neutral.

The law suit stems from allegations by Apple that Microsoft and Hewlett Packard violated copyrights that Apple holds on the way its popular Macintosh computers display information on a screen. This, of course, involves its

desktop operating environment which uses icons pull-down menus etc. The case is being heard in two parts. The first involves the construction of a licence agreement and the second involves the question of breach of copyright. It is in relation to this first limb that the San Francisco Federal Court Judge handed down his decision on 17 March 1989.

Microsoft had contended that the disputed "window" products were covered by a 1985 licence agreement with Apple. After a one hour Court hearing on 17 March 1989, Judge William Schwarzer rejected that argument. He decided that "the November 22 1985 settlement agreement, licensed Microsoft to use the visual display in windows 1.0 and the named application programs in current and future software products". Judge Schwarzer found that the licence agreement was limited to the early version of windows. "It is not

reasonable to construe the agreement as giving Microsoft an essentially open ended licence to use whatever visual displays its named software could generate". The Judge went on to say that it cannot be disputed that window 2.03 is significantly different from window 1.0. Hence, he found that the licence agreement "was not a complete defence to Apple's infringement claim with respect to windows 2.03".

It is these comments which have been expanded by Microsoft. Its Vice President, William Neukom said, "we intend to prove that the visual displays in windows 2.03 can be traced to the visual displays in the six products named in the licence, Microsoft innovations or expressions in the public domain. We have not infringed any Apple copyrights".

Editors

("Copyright Act" continued)

that the article cannot be obtained in Australia from the copyright owner, assignee or licensee within a reasonable time (to take into account the time which is reasonably required in the

industry for an Australian copyright owner to import or manufacture and market copies of the article).

5. The periods which will be considered to be reasonable will be prescribed by regulations.

6. An article is "available" in Australia if there is lawfully available an article which is substantially similar to that which the importer proposes to import. The Committee was unable to suggest a more precise

expression than "substantially similar to". The Committee decided that it will be for the Courts to apply these words to the infinite variety of circumstances that are likely to arise. The Committee, in considering the importation of books indicated, as an example of what is intended, an edition of a book which comprised essentially the entirety of the work the subject of the copyright.

One commentator [Professor Jim Lahore] has already indicated that it is not clear how this example provides any explanation of the phrase used. Nor is it clear how this test can usefully be applied to computer software. For example, functionally similar or literally similar?

7. It should not be possible to rely on copyright in a label, mark or other work affixed to an article to prevent importation of the article. This recommendation would avoid the result in the *Bailey's Irish Cream* case.
8. The knowledge provisions in Section 37 and 102 of the Act should be brought into line with the provisions in Section 132, as amended by the Copyright Amendment Act 1986. Under Section 132, it is only necessary to prove that the

defendant knows, or ought reasonably to know, that the article is an infringing article.

9. There should be no criminal penalties for unauthorised parallel importing.
10. The importation provisions in Section 135 should apply to all works and subject matter other than works, and reproductions of all kinds, not to printed copies of works alone.

The Committee's Conclusions in Relation to Computer Software

On balance, computer software should not be treated any differently from other works protected by copyright.

For copyright purposes computer software is "a literary work", and it would only cause confusion to exclude it from one aspect of the Act, namely, protection from parallel importation.

The Committee's recommendations that importation be allowed where there is either a specific order or where the article sought to be imported is unavailable in Australia, as outlined above, do offer solutions to the major problems raised by software users. The range and quantity of imported software products available to the Australian consumer should increase. On the other hand, the support and marketing activities of licensed importers will not be substantially affected because

the demand for imported software products that need to be altered to meet Australian conditions will remain unaffected, and in the area which will be affected – packaged software – the number of unsophisticated users who do require support will be unaffected by such changes.

The Committee considered that there is a case, in the interests of consistency, for an amendment to Section 135 so as to include computer software.

The Committee acknowledged that in the end it had to make a value judgment, and accepted that repeal of the parallel importing provisions of the Copyright Act would have a detrimental effect on Australian manufacture, technology and technical know how, and on consumer back up services. The Committee decided that the sections provided very real protection and benefit to authors whose work is internationally distributed.

Another important consideration for the Committee was that Australia maintain its position in relation to other nations which have similar copyright laws.

Despite these conclusions the Committee was concerned by the general absence of competition, inefficient practices and possible overpricing. Hence the compromise solution proposed by the Committee.

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WE REGRET TO INFORM YOU THAT THE DATE AND VENUE OF THE SOCIETY'S JUNE MEETING ONCE AGAIN HAS BEEN CHANGED. THE NEW DETAILS ARE:

DATE: Wednesday, 14 June 1989
TIME: 12.30 pm
VENUE: The Law Society Meeting Room
Level 2, 170 Phillip Street
SYDNEY NSW 2000
COST: Members free, non-members \$5.00
ENQUIRIES: Gigi Chea – 250 3535

("Copyright Act" continued)

The Committee acknowledged that its recommendations were complex and would lead to uncertainty and difficulty in the marketplace and recommended, in the alternative, that the sections in the Act remain as they are subject to the knowledge provisions being brought into line with the current provisions of Section 132.

In Conclusion

Professor Jim Lahore has described the recommendations of the

Copyright Law Review Committee "as an aberration in current copyright thinking which is moving to an expanded concept of reproduction/use/rental to meet the needs of authors under threat from new technology". Professor Lahore is firmly of the view that the Government should adopt the Committee's alternative recommendation (that the sections remain as they are subject to minor amendments to Section 132) and not proceed to implement the Committee's suggested scheme: a scheme which the Committee itself clearly proposes without strong

conviction that is the right way to go.

Maybe this view is a little too pessimistic. In a rapidly changing technological environment it is perhaps wiser to move cautiously. The Committee's recommendations, if adopted, would immediately address some of the more pressing consumer concerns, while maintaining a basis of legislative protection for copyright works and other articles.

* *Lawyers from Sly and Weigall*