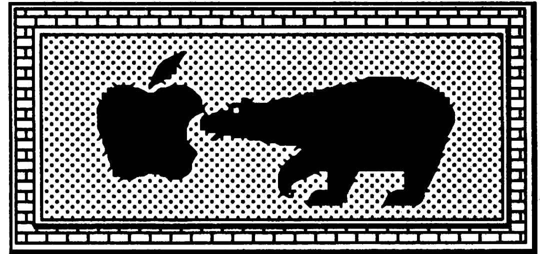
The Apple Case:

The Latest Word, but not the Last Word



Following Apple v Computer Edge, the state of the law before the 1984 amendments can be very briefly summarised as follows.

* A written source program is a literary work (per curiam).

* Object code as it exists in computer storage media is not a literary work, (therefore removing avenues 7 & 8) either because-

(a) writing is required for a literary work, independently of s 22 (1) of the Act which provides that a work is made when "first reduced to writing or to some other material form" (per Gibbs CJ); or

(b) the s 22 (1) requirement of "material form" requires a literary work to be perceivable by the senses (query whether with or without a machine intermediary) (per Brennan J); or

(c) it is not in writing, not perceptible and not intelligible to humans nor intended to be (per Gibbs CJ, Brennan and Deane JJ). (Mason and Wilson JJ not deciding, but dissenting against the reasoning in (a) and (b)).

* Object code as it exists in computer storage media is not an adaptation as a translation of written source code (therefore removing avenue 2) because-

(a) it does not "express or render" the source code, but puts it into action (per Gibbs CJ and Deane J, Brennan J not deciding).

(b) an adaptation must also be a literary work (per Gibbs CJ, Brennan J, Mason and Wilson JJ). [This second reason appears to be in error, confusing s31 (1) (a) (vii) with s31 (1) (a) (vi). Sub-part (vii) only applies where a reproduction of an adaptation is in issue, not where a "direct" adaptation of a literary work is in issue.]

* Object code as it exists in computer storage media is not a "work that is an adaptation", as it is not a work in its own right, and therefore s31 (1) (a) (vii) does not apply, so a program in one computer storage medium cannot infringe copyright as a reproduction of the program in another computer storage medium (i.e. a reproduction of an adaptation; therefore removing avenue 5).

* Object code as it exists in computer storage media is not a reproduction of written source code (therefore removing avenue 1) because-

(a) "a work which is manufactured in accordance with written instructions is not a reproduction of those instructions": *Cuisenaire v Reed* [1963] VR 719; *Brigid Foley Limited v Ellott* [1982] RPC 433;

(b) it embodies the idea, and logical structure, of the source programs, but does not reproduce the expression of the idea and of the logical thought which is to be found in the source programs (per Gibbs CJ, Brennan and Deane JJ; Mason and Wilson JJ not deciding).

The majority therefore decided that none of the avenues for infringement available under the *Copyright Act 1968* (1, 2, 5, 7 and 8) were open to Apple.

Unresolved matters

The following matters were left unresolved under the pre-1984 law:

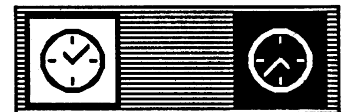
* Whether source code in computer storage media is protected by copyright in that medium as (a) a literary work in itself, (b) an adaptation of a pre-existing written work, or (c) a reproduction of a pre-existing written work. The majority's reasoning suggests not, so even the ostensible recognition of copyright in source code may be illusory, in that it may only apply to source code in written form.

* Similarly, in relation to conventional literary works held in computer storage media, the majority's reasoning suggests they are not protected.

CALENDAR

ACTSCL: Australian Capital Territory Society for Computers & the Law
NSWSCL: New South Wales Society for Computers & the Law
VSCL: Victorian Society for Computers & the Law
WASCL: Western Australian Society for Computers & the Law

23 July
WASCL: Annual General Meeting
August
VSCL User Panel Discussion
6 August
NSWSCL E.F.T. Regulation
20 August
NSWSCL Legal Databases in West Germany [Speaker: Jürgen Gödan of the Max-Planck-Institut, Hamburg]
3 September
NSWSCL: Remedies in Technological Disputes
24 September
WASCL: Meeting
1 October
NSWSCL Franchise Agreements Bill [Speakers: Bill Koeck; Michael Saunders; Howard Schreiber; Katrina Lee]
29 October WASCL Meeting
26 November WASCL Meeting



COMPUTERS & LAW
Newsletter of the Australian Societies for Computers & The Law
Editor: Graham Greenleaf
Faculty of Law
University of New South Wales
PO Box 1 Kensington NSW 2033
Australia Tel (02) 697 2233
Page Layout: Richard Ure
13 Warrington Avenue Epping NSW
Tel (02) 868 3778
Production: Jill Matthews
70 Piper Street Lilyfield NSW 2040
Tel. (02) 569 5310
Subscriptions: $20 per 4 issues
Advertising: Inserts $125; within the newsletter, rates by negotiation.
Newsletter contents may be reproduced if the source is acknowledged.