COMPUTER PROGRAMMES - COPYRIGHT -

Apple Computer Inc. v. Computer Edge Pty. Ltd. Federal Court of Australia. Beaumont J. 7 December 1983. Unreported.

This decision on Australian domestic law is of international importance. The protection of intellectual property is a matter of great concern. The Australian position is therefore of interest to international lawyers.

This case involved proceedings for injunctive relief pursuant to s.80 of the Trade Practices Act, 1974 and pursuant to s.115 of the Copyright Act, 1968; damages and an account of profits are also sought. Contraventions of ss.52, 53(c), 53(d) and 55 of the Trade Practices Act and infringements of copyright were alleged. The proceedings arose out of the importation into and sale in, Australia by the first respondent, a Victorian company, of micro-computers under the name "Wombat". The second respondent, one Michael Suss, was the managing director of the first respondent which retailed computers and computer equipment. The "Wombat" computer was manufactured in Taiwan without the consent of the applicants. The applicants claimed that to the knowledge of the respondents, the Taiwanese manufacturer of the "Wombat" computer had copied their "software" (computer equipment) and "hardware" (Peripheral equipment).

The first applicant, a Californian corporation, makes and sells computers under the name "Apple". The second applicant Apple Computer Australia Pty. Ltd. is the Australian distributor of the first applicant's computers, including the "Apple 11" computer.

In relation to the claim under the Trade Practices Act, the applicants contended that, in marketing the Wombat computer, the first respondent was selling or offering for sale micro-computers which were similar in shape and had a similar keyboard to the Apple 11 computer and operate using Apple 11 programmes; that the first respondent was advertising that the Wombat computer was "compatible with programs for the Apple 11 ", and that such conduct signified that the Wombat computers were manufactured or sold or advertised by or with the licence of the applicants or otherwise had the same provenance as the Apple 11 computers.

In rejecting the claim, Beaumont J. said:-

> "In my opinion, no contravention of s.52 has been made out in the present case for the reason that the circumstances do not disclose conduct which could, on any view, be likely to mislead or deceive. For this purpose, the question is one for the Court and the respondents' conduct must be looked at as a whole. But, in the end, in a case such as this, the issue is essentially one of fact, namely, whether the labelling of the respondents' goods was sufficient to dispel an impression that might otherwise be gained from the similarity of the two products that the respondents' goods were somehow connected with the applicants or that the applicants approved of their sale (see Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd. (1982) 56 A.L.J.R. 715 per Mason, J. at p.723).

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> In the present case, in my view, no purchaser of the respondents' goods is likely to be misled or deceived into believing that the respondents or their goods are in any way associated with the applicants: on the contrary, the respective products are clearly distinguished from one another by the use of very different brand names and the reference, in advertising, to the "compatibility" of Wombat software with programmes for the Apple 11 computer only serves to reinforce the distinction. In my opinion, the primary claim under s.52 must fail."

In relation to the claim based in copyright, Beaumont J. found that a computer programme is not a "literary work" within the meaning of the Copyright Act. His Honour said:

> "In my opinion, none of the programmes are literary works within the meaning of the statute. In my view, a literary work for this purpose is something which was intended to afford "either information or instruction or pleasure in the form of literary enjoyment" (see Hollingrake v. Truswell (1894) 3 Ch.420; Exxon Corporation v. Exxon Insurance Consultants International Ltd. (1982) R.P.C. 69 at p.88; of D.P. Anderson & Co. Ltd. v. Lieber Code Company (1917) 2 K.B. 469; Mirror Newspapers Ltd. v. Queensland Newspapers Ltd. (1982) 59 F.L.R. 71; Northern Office Micro Computers (Pty.) Ltd. v. Rosenstein (1981) (4) S.A. 123(c); Sega Enterprises Ltd. v. Richards (1983) F.S.R. 73 at pp.74-5). The function of a computer programme is to control the sequence of operations carried out by a computer. In this sense, as Dr. Emmerson submitted on behalf of the respondents, a contrast may properly be drawn between something which is merely intended to assist the functioning of a mechanical device and literary work so called. The position is even stronger in the case of the object programme, as Rosenstein, supra, recognises: this type of programme as Dr. Emmerson submitted, is at a more advanced stage of the process of controlling the sequence of operations carried out by a computer.
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> Support for the conclusion I have formed may, I think, be found in the circumstance that the legislature has decided to extend the protection afforded by statutory copyright to literary works in the form of cinematograph films, sound recordings and the like. This was done at a time when computers had been developed and were well known. In my view, the omission by the Parliament to make any reference to computers or computer equipment when it determined to extend the scope of copyright protection should be treated as an indication on its part that this field was not to be afforded the significant privilege given by copyright, but intended rather to leave such matters to be dealt with by other legislation dealing with

patents and industrial designs. As a matter of policy, support for this approach is found in the observations made by Fox and Franki, JJ. in Edwards Hot Water Systems v. S.W. Hart & Co. Pty. Ltd. - unreported 12 October, 1983 at pp. 7, 10, 11; 7, 8 and 34 respectively).

I should add that because of the 1976 and 1980 amendments to the United States copyright legislation, specifically dealing with copyright protection for computer programmes, decisions of the Courts of that country, e.g. Apple Computer Inc. v. Franklin Computer Corporation - unreported, 30 August, 1983, cannot assist in the present case."

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The decision was the subject of considerable comment, as it had clear implications for the computer industry in Australia. It was said that the investment the Government sought to encourage in so-called "sunrise industries" would not eventuate unless property rights were conferred in computer programmes. This was not a criticism of the Court's interpretation of the statute, but rather a call for new legislation. The Government indicated its concern by the rather unusual step of three Ministers making a joint statement, which is reproduced below:-

The recent decision of the Federal Court that Australian copyright laws do not protect certain computer software has created significant problems for the Australian software industry. This is an important industry in its own right and is capable of making a real contribution to the Government's industrial development objectives.

The lodging of an appeal against the decision means that the legal status of software is uncertain. However, industry should note that it is the Government's intention to promptly undertake such legislative action as is necessary to ensure that software is adequately protected. This action could include if necessary some backdating of legislation, certainly to the date of this announcement, and possibly beyond.

The decision also has broad implications for intellectual and industrial property in Australia. Departments have already consulted with industry regarding international developments on the legal status of computer software, computerised data banks and computer-created works These matters have also been raised in the current review by the Attorney-General's Department of audio-visual copyright laws

Regarding legislative protection of software, a major issue to be resolved in the long-term is whether a copyright style of protection is to be preferred, or a form of protection more analogous to patents International consensus on this issue still seems some way off.

Ministers stressed however, that prompt legislative action would be taken in the short term if necessary. A first step may be to amend the Copyright Act 1968 to confer copyright protection on computer software. Interested parties would be consulted on the appropriate form of such action. It will be necessary to ensure that proposed solutions are consistent with existing copyright, patent and designs laws and with Australia's obligations under the relevant international conventions.

A symposium will be held early next year to bring together industry and user groups, intellectual property lawyers, academics and government experts to discuss an appropriate policy for the longer term.

All enquiries may be directed to Mr P Crisp, Attorney-General's Department, Canberra, ACT, 2600 (telephone 062/719608).

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