COMPUTERS & LAW

NEWSLETTER FOR THE SOCIETIES FOR COMPUTERS AND THE LAW IN NEW SOUTH WALES, VICTORIA, SOUTH AUSTRALIA, WESTERN AUSTRALIA, QUEENSLAND, THE AUSTRALIAN CAPITAL TERRITORY AND NEW ZEALAND

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COPYRIGHT PROTECTION FOR THE "LOOK AND FEEL" OF SOFTWARE

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Abstracted below is Mr. Moon's address to the New Zealand Society for Computers and the Law, 11 April 1989.

What Is "Look and Feel" Protection?

"Look and Feel" is a recently developed United States copyright doctrine supposedly started by the judgment in *Whelan Associates Inc. v. Jaslow Dental Laboratory Inc. 797 F. 2D 1222.* It is a doctrine under which copyright protection for a computer program has been extended beyond literal reproduction of the program code. There are two aspects to "Look and Feel".

1. The protection of the structure, sequence and organisation of a program; and

2. The protection of user interfaces.

That copyright extended to the first aspect was upheld by the appellate court in *Whelan*. In that case the court stated that "Congress intended sequencing and ordering to be protectable in the appropriate circumstances, and the computer field is not an exception to this general rule".

The second aspect was established by the decision in the later case of *Broderbund Software Inc. v Unison World Inc. 231 USPQ (BNA) 700Inc. 231 USPQ (BNA) 700*

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These two decisions have been followed by various US courts. However the doctrine has been attacked by a number of commentators on the basis that it means that ideas are protected and not simply expression of ideas. (It is a fundamental principle of copyright that it does not extend to the protection of ideas per se.) The "look and feel" doctrine can also be criticised on the basis that the courts have not always properly concentrated on what is alleged to be the copyright work and then followed the chain of copying directly to the defendant's alleged infringement. In *Whelan* it was asserted that the copyright work was the plaintiff's program in either source or object code form. However, in *Broderbund* the copyright works were the various screen displays per se which were catergorised as "audio visual works" in accordance with the US Copyright Act of 1976.

——NEW SOUTH WALES SOCIETY NEWS ——

The Society's Annual General Meeting was held on 21 March. The President's and the Treasurer's reports are included in this edition. The 1989 officer bearers are Richard Davis (President), David Lewis (Vice President), Connie Carnabuci (Secretary), Les Lawrence (Treasurer), Jane Rawlings (Meetings Officer), Elizabeth Broderick (Newsletter Editor), Robert Johnston (Assistant Newsletter Editor), Andrew McBurnie (Subscriptions Officer) and Katrina Henty (Proceedings Editor).

The Society wishes to thank Jim Fitzsimons, our President for the last two years. His untiring efforts have been much appreciated.

On Wednesday 5 April, Mr. Don Jenkins gave a most informative talk to the Society on Local Area Networks.

On 10 May, Jim Fitzsimons of Abbott Tout Creer Wilkinson and Philip Argy of Mallesons Stephen Jaques will talk about the Effects of Recent Legal Developments on Shrink Wrap Licensing.

As we reported in the last edition of the Newsletter, the Editors have heard from the New Zealand Society for Computers and the Law and this edition is our first **Australasian** Newsletter. We welcome our New Zealand readers and hope that there can be considerable interchange between our two societies.

About the New Zealand Society

The Society was founded in September 1987 in Wellington following a special interest meeting on Computers and the Law, organised by the Society's current Chairman, Anthony Wong.

This year's Committee members are Anthony Wong (Chairman), Craig Sinclair, Gavin Adlam, John Terry, Julie Andrews and Robin Anderson.

You will see a list of New Zealand conferences on the last page of the newsletter. For more details please contact Anthony Wong ph: (04) 712 112

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("Look and Feel" continued)

The most important "look and feel" case in the United States is undoubtably *Apple v. Microsoft and Hewlett Packard* where Apple is suing Microsoft and Hewlett Packard for infringing the "look and feel" of Macintosh software by producing user interface software called "Windows". That case is being heard in two parts and the hearing as to Microsoft's defence that "Windows" was within the scope of a licence granted to them by Apple has recently been rejected. The second part of the case, that "Windows" infringes Apple's copyright, has yet to be heard.

There has been much uninformed comment in the computer press relating to this case. It is asserted by many writers, that Apple cannot own any valid copyright as its user interfaces were based on ideas developed by Xerox. There is in fact no requirement that a work need be new and non–obvious to attract copyright. The press are confusing principles of patent law with those of copyright. For copyright to subsist there need only be "originality" and this basically means that the copyright work was not a copy of someone else's work. It is legitimate to copy an idea provided that there is originality in the manner in which the copy is expressed.

Is "Look and Feel" Protection Available In New Zealand?

For the purposes of discussion, assume the following example:

A New Zealand software house writes software which provides a Macintosh type user interface for IBM mainframes. The screen displays produced are substantially identical to those used in the Macintosh and the interface functions in the same way viz–a–viz the icons, pull–down menus, etc. The New Zealand software house initially had been working with Apple on this project and had been provided with considerable information although they did not copy any Apple code. In the end, negotiations with Apple broke down and no agreement was ever concluded because the New Zealand software house considered that Apple was too greedy in the margin it required for distributing the software. The New Zealand software house decided to go it alone.

Question: Can Apple obtain an injunction in New Zealand restraining the New Zealand software house from dealing in this software?

The Apple User Interface Code as Literary Work.

It is established that copyright subsists in source code in New Zealand: *IBM v. Computer Imports Limited (unreported CP 494/86, 21 March 1989, Auckland).* It was also established in that case that the copying of object code infringed copyright in the source code on the basis that, either the object code was simply a translation of the source code, or that the object code was a reproduction of the source code. Can the reproduction of the look and feel of Apple's program code, namely the user interface, infringe copyright in that code? It should be borne in mind that the Copyright Act 1962 in relation to literary works provides that making a reproduction or an adaptation of a work is an infringing act. "Adaptation" includes translating, and converting a work to another form, such as converting a novel to a play.

The question posed is analogous to asking whether a picture **reproduces** text or is an adaptation of it. Adaptation can be ruled out as the statutory definition is narrow. As to reproduction it is well established that it is not necessary for there to be visual similarity. Smellie J. in *IBM v. Computer Imports* held that object code **reproduced** source code (contrary to the decision of the High Court of Australia in *Computer Edge v. Apple) 65 ALR 33.* However, it is one thing to say that one code reproduces another because of its one to one correspondence and because it has already been decided that the second code is a translation of the first, yet it is quite another to say that a picture can reproduce text.

The question can be rephrased: Can there be reproduction of something (the interface look and feel) buried within text (program code) without actually reproducing that text? Some English commentators have suggested that there can, by virtue of the case law which has supposedly held that copyright in a book protects the plot in addition to the text. The authority cited is *Ravenscroft v. Herbert [1980] RPC 193.* This analysis seems faulty, since in that case chunks of text were literally copied as well as the plot.

I think the determining legal authority stems from a case which was conducted in more than one Commonwealth jurisdiction, and that is *Cuisenaire v. Reed [1963] VR 719.* It was there held that the making of an article described as specified in a book does not infringe the literary copyright in that book. In my view the writing of original program code to produce a user interface which looks and feels like the Macintosh interface does not infringe the Macintosh code on the basis of *Cuisenaire v. Reed.*

Copyright in the Drawings of the Interface Screens – Artistic Works

Under the Copyright Act drawings are "artistic works" independently of artistic merit. It is an infringement to reproduce or publish artistic works without authority. Presumably prior to the code being written by Apple, drawings were made of the desired screen "visuals". Hence, copyright in artistic works may be a vehicle to at least protect the "look" of the interface if not the "feel".

It may be argued that the New Zealand software house did not see Apple's original drawings, but even if they did not, it is

well established in New Zealand that indirect copying infringes. That is, a copy of a copy is still an infringement and there is even infringement where one link in the chain of copying is a verbal or written description, provided it is sufficiently detailed to convey the expression of the idea exhibited in the original drawing: *Frank M. Winstone v. Pli Products [1985] 1 NZLR 376.*

Can the writing of code which, when executed produces a screen display which replicates the look of the Macintosh user interface constitute a reproduction of Apple's original screen display drawings? Strictly speaking, it could be argued that since the prescribed infringing act is a "reproduction" it would only be users who could infringe, since it would be the users who caused the program to be executed to produce the screen display. Nevertheless in practical terms a Court may well take the view that the making of something, the primary purpose of which was to display a "reproduction" constitutes infringement. It should be noted here that the fact that the "reproduction" would be ephemeral and cease at the command of a user would not be a problem since there is no requirement under the New Zealand Act that infringing works possess any permanency.

Although at the limit of the law in relation to artistic works (and there is much case law in New Zealand in this area of copyright), I think Apple might well succeed on this basis against the New Zealand software house.

Cinematographic Works – The NZ Equivalent to US Audiovisual Works

In the United States "look and feel" has been influenced by the case law on video game infringement. The decisions in these cases, although not always crystal clear, generally relied on the copyright in the screen displays as "audiovisual works" and not in the copyright subsisting in the code which generated these displays. The US Act of 1976 establishes "audiovisual works" as a category of work entitled to copyright and this category is defined in quite broad terms. For example, movie films are but one sub–species of audiovisual works which encompass images and sounds stored in a variety of technological media, which are intrinsically intended to be shown or displayed. In New Zealand we do not have any such broad category, the closest being "Cinematograph films". These are defined as "any sequence of visual images recorded on material of any description so as to be capable, by use of that material, of being shown as a moving picture ..." While this might be stretched to cover a ROM chip storing the code for at least the "Attract" sequence of a video game, it seems difficult to stretch it to cover a user interface where there is a static display which alters only upon the user carrying out some predetermined action. Furthermore the primary infringing act in relation to cinematograph films is "making a copy of the film". I doubt that there can be infringement under this heading.

Misuse of Confidential Information

New Zealand, as well as other Commonwealth jurisdictions, recognises certain proprietary rights in confidential information which includes trade secrets, industrial know how, etc. The relief provided to the owner of such information was established by the courts of equity and is not the subject of any statute. In order to succeed in proceedings for breach of confidence it must be established that:

a. the information is of a confidential nature;

b. the information in question is communicated in circumstances importing an obligation of confidence; and

c. the recipient has made or is making an unauthorised use of that information: *Coco v. AN Clark, [1969] RPC 41* an English case, followed in many proceedings before the New Zealand High Court and Court of Appeal (eg *AB Consolidated v. Europe*

Strength Food Co. [1978] 2 NZLR 515).

In the present example, Apple has provided the New Zealand software house with information. It could probably show, without too much difficulty, that this information, including the screen display drawings, is rarely released to non–Apple personnel or allowed off Apple premises. The drawings are probably also marked "Confidential". It is also likely that the context in which the New Zealand software house received this information is such as to impose an obligation of confidence on the New Zealand software house, namely the information was given as part of an arrangement whereby Apple and the New Zealand software house were to jointly profit by the venture. This aim could be defeated if the information fell into the hands of competitors. Furthermore, once this arrangement was terminated, the continued use of the information by the New Zealand software house was unauthorised.

In New Zealand I believe that protection for "look and feel" would be available under the doctrine of misuse of confidential information, so long as the scenario was along the lines of the present example. In fact this is usually the case. Most of the US "look and feel" cases have involved access to confidential information, and there has usually been some form of relationship between the plaintiffs and defendants which later broke down.

It can be concluded that "look and feel" protection for software is likely to be available in New Zealand where confidential information has been transferred to the infringer and there is a possibility that even where that is not the case, that protection is available by virtue of the copyright subsisting in the artistic works from which the user interface screen displays have been coded.

* *Partner, A.J. Park & Son, Wellington*

HIGHLIGHTS FROM

THE PRESIDENT'S REPORT

NEW SOUTH WALES SOCIETY FOR COMPUTERS AND THE LAW

21 March 1989

Six years old and the Society is still going strong. Each year the Committee wonders whether there will be enough topics of interest to warrant holding a meeting every month. We usually find that there is insufficient time to schedule all the meetings we would like. 1988 held a full calendar of topics and inspite of not being able to arrange a speaker in time for the March meeting, 1989 is already filled up. We have not managed to schedule an address by the new Privacy Commissioner which is something we aim to do.

Meetings

On 6 April the topic at an evening meeting was litigation support. Speakers included Mr. Justice Brian Beaumont, Ms. Donna Rubenstein and Mr. Michael Ball. This meeting was very well attended which reflected the high quality of the speakers as well as the refreshments provided by Informatics.

The lunchtime meeting of 4 May had to be postponed to 24 August when Peter Bradshaw from Austraclear