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'Look and Feel' in America

• *Daniel Hunter*

Computer software raises complex questions for Intellectual Property lawers. Computer programmes are clearly afforded some protection by copyright, both in Australia and the United States, but the question is, how far does this protection extend?

The issue of 'look and feel' protection arises because of the special nature of computers and the computer industry. Certain manufacturers create computer programmes which become 'industry standards'. These programmes are the market leaders with wide margins over their competitors. Some smaller manufacturers have decided to replicate the industry standard programmes. They do this not by actually copying the code which is protected by copyright [1], but by copying the 'look' and 'feel' of the programme.

In the United States there are two streams of computer copyright cases which though seemingly separate have recently combined to form the basis for 'look and feel' litigation. The first stream of cases decided the extent of copyright protection for computer software as a literary work. The second stream of cases examined the copyright in the audiovisual display created by the computer programme.

The Literary Work Stream

Over time the literary work stream decided three questions:

1. Does copyright subsist in an applications programme? This was decided in the affirmative.[2]

2. Does copyright protect operating systems programmes? Again the answer was affirmative.[3]

In this issue ...

3. Does the 1976 Copyright Act protect the structure, sequence and underlying organisation of the computer programme?

The important question in the 'look and feel' arena is the third. [4]

The literary work stream has the protection of the structure, sequence and organisation at the apogee of current decisions. **Whelan** v **Jaslow**[5] and **Plains Cotton** v **Goodpasture**[6] are basically irreconcilable. However there seems to be a general acceptance that the structure is protected.

But should we, in principle, protect the structure of computer programmes? The question is best answered by applying the reasoning of **Meredith** v **Harper & Row**.[7] The structure of a book in that case was found to be protectable expression. There has been no hue and cry over **Meredith**. It seems therefore that book structure is protectable expression. It would be intolerable if computer programme structure should be denied equal protection on the basis merely that it is a new field of copyright.

The Audiovisual Work Stream

The audiovisual work stream decided two different questions:

1. Does copyright protect the displays in computerised video-games?[8]

2. Does copyright protect the computer displays of programmes which are not video-games?

The audiovisual work stream is the true 'look and feel' stream. In the author's opinion, the literary stream and the audiovisual stream should not be joined, because they deal with two different categories of copyright works. Each stream works more coherently without elements of the other being introduced and confusing the issues. The case of **Broderbund**[9] to name but the most obvious, stands as warning of the danger the courts face if they attempt to join the streams.

The true 'look and feel' stream - the audiovisual work stream, deals with two protectable elements: the 'traditional' display screens copyright and the newer 'sequence' copyright.

Traditional Audiovisual Copyright

Two cases have decided copyright issues on the basis of traditional audiovisual copyright. [10] The pending Apple case is likely to follow their lead. [11] The courts have created nothing controversial in applying traditional audiovisual copyright to computer displays. There is no distinction between these cases and the cases which dealt with copyright in video-games. [12]

The restriction the courts have placed on 'look and feel' copyright, by dealing only with the visual appearance of the screen, has the advantage of keeping copyright within its traditional bounds. The judges may then rely on the wealth of experience and precedent in the field. The restriction does not disadvantage a plaintiff who has placed sufficient work into the computer displays to merit copyright protection. Therefore manufacturers are adequately protected. This limit on 'look and feel' copyright has struck a balance between the competing policies of protection of intellectual effort and avoiding monopoly of markets.

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The New Application: Sequence

There is however a new field of copyright protection: the sequence of computer displays. Courts in four cases, **Broderbund**[13] **MTI**[14] **Johnson**[15] and **Lotus**[16] have determined that the sequence is properly the subject of copyright. This means that there are two new elements of copyright protection for computers: the 'structure , sequence and organisation' of the code and the sequence of display. One court [17] called both elements 'non-literal expression.'

Again the question must be asked: should sequence be protected? It is hard to see why it should not. If one accepts the principle of **Meredith** then structure is expression and worthy of protection. This is true of book structure, programme structure and display screen structure. The latter element, display screen structure, is simply the sequence the displays are presented to the user. Provided we can properly characterise a particular plaintiff's sequence as expression, then there is no reason why we should not protect it.

In the author's opinion then, interfaces are correctly protected by this new form of copyright.

The Australian Law

In Australia, passing off, unfair competition, and unfair trade practices clearly will not avail a potential 'look and feel' plaintiff in the 'standard' case. Copyright is the most appropriate form of action, just as in the United States. However, Australian courts are more tied to precedent than their American counterparts. This may mean that 'artistic work' copyright, the Australian counterpart to 'audiovisual work' copyright, will not assist the plaintiff in a 'look and feel' case. Unless the judges allow computer generated images on a screen to constitute a painting or drawing, the plaintiff will fail. [18]

The application of standard copyright concepts is similar in the United States and Australia, and so given the above provision, the 'look and feel' of a programme should be protected. The arguments on granting rights to 'industry standard' computer companies with its attendant diminution of the rights of others to copy these innovations, is one which courts in Australia are used to making. Indeed, the balancing act is as old as copyright itself. There is no policy reason why Australian judges should not follow their Trans-Atlantic brethren.

Whether the courts in Australia are willing to go this far is unlikely. The spectre of granting overwhelming monopolies, which held sway in **Syncercom v University Computing,**[19] will probably frighten the technically unsure judiciary into denying protection. This would be a pity, since as I have shown, there is nothing unusual about the field. ■

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Footnotes

[1] Gaze, B., Copyright Protection of Computer Programmes (Melbourne, The Federation Press, 1989); Latman, A. & Gorman, R. Copyright for the Eighties (Charlottesville, The Mitchie Company, 1981), pp110-132; Clapes, A.L., Software, Copyright & Competition (New York, Quorum Books, 1989); Nimmer, M.B. & Nimmer, D., Nimmer on Copyright, (New York, Matthew Bender) S 2.04[C]; Commerce Clearing House, Inc., Guide to Computer Law, (Chicago, Commerce Clearing house, Inc.) [100-] 1210

[2] **Syneroom Technology, Inc v University Computer Co.,** 462 F.Supp. 1003, 199 U.S.P.Q. 537 (N.D. Tex. 1978)

[3] **Apple Computer, Inc, P v Franklin Computer Corporation,** 714 F, 2d 1240 (3d Cir. 1983), cert dismissed, 464 U.S. 1033, 104 S.Ct 690, 79 L.Ed.2d 158 (1984); **Apple Computer, Inc. v Formula International, Inc.,** 562 F.Supp. 775 (C.D. Cal 1983), aff'd 725 F.2d 521 (9th Cir, 1984)

[4] Both questions 1 and 2 are settled law and are not discussed here. For a discussion of the cases deciding g these questions see generally Gaze, B., Copyright Protection of Computer Programmes, (Melbourne, The Federation Press, 1989); Latman, A. & Gorman, R. Copyright for the Eighties, (Charlottesville, The Mitchie Company, 1981), pp110-132; Clapes, A.L., Software, Copyright & Competition (New York, Quorum Books, 1989); Nimmer, M.B. & Nimmer, D., Nimmer on Copyright, (New York, Matthew Bender) S 2.04[C]; Commerce Clearing House, Inc., Guide to Computer Law, (Chicago, Commerce Clearing house, Inc.) [100-] 1210

[5] **Whelan Associates , Inc v Jaslow Dental Laboratories, Inc.,** 609 F.Supp. 1607 (E.D. Pa. 1985), aff'd 797 F.2d 1222 (rd Cir, 1986), cert denied, __ U.S. __, 107 S.Ct.877 (1987)

[6] **Plains Cotton Co-operative Association of Lubbock, Texas v Goodpasture Computer Service, Inc.,** 807 F.2d 1256, 1 U.S.P.Q.2d 1635 (5th Cir. 1987), reh'g denied, 813 F.2d 407 (5th Cir.), cert denied, __ U.S. __, 55 U.S. Law Week (S.C.) (1987)

[7] **Meredith Corp. v Harper & Row Publishers, Inc.,** 378 F.Supp. 686 (S.D. N.Y.), aff'd 500 F.2d 1221 (2d Cir, 1974), opinion after trial, 413 F.Supp 385 (S.D. N.Y. 1975)

[8] The answer to this question is yes: **Atari, Inc. v Williams Electronics, Inc.** 217 U.S.P.Q. 746 (E.D.Cal 1981); **Atari Inc. v North American Philips Consumer Electronic Corp.**,672 F.2d 607 (7th Cir.), cert denied, 459 U.S. 880; **Midway Mfg Inc. v Bandai-America, Inc.**, 546 F.Supp 125 (D.N.J 1982); **Stern Electronics Inc.** v **Kaufman,** 669 F.2d 852 (2d Cir. 1982); **Kramer Mfg Co, Inc. v Andrews,** 783 F.2d 421, 228 U.S.P.Q. 705 (4th Cir. 1986), cert denied, 207 S.Ct 77 (1987)

[9] **Broderbund Software, Inc. v Unison World, Inc.,** 648 F.Supp. 1125, 1133 (N.D. Cal.1986)

[10] **Digital Communications Associates, Inc.** v **Softklone Distributing Corporation,** 2 U.S.P.Q. 2d 1385 (N.D. Ga. 1987); **Telemarketing Resources dba Brown Bag Software** v **Symantec Corp and John Friend dba Softworks Development,** 12 U.S.P.Q. 2d 1991 (N.D. Cal 1989)

[11] See Chapter 2 n** above and accompanying text

[12] See Chapter 2 n** above and accompanying text

[13] **Broderbond Software, Inc.** v **Unison World, Inc.,** 648 F.Supp. 1125, 1133 (N.D.Cal. 1986)

[14] **Manufacturing Technologies, Inc.** v **Cams, Inc., Edward Cornier, Kenneth Laviana and Norman St Martin,** 706 F.Supp 984 (D.Conn. 1989)

[15] **Johnson Controls, Inc.** v **Phoenix Control Systems, Inc, Rodney Larsen and Irene Larsen, John Schraz and Martha Shratz,** 886 F.2d 1173 (ith Cir. 1989)

[16] **Lotus Development Corporation** v **Paperback Software International and Stephenson Software, Limited** 740 F.Supp 37 (D. Mass. 1990)

[17] The Ninth Circuit Court of Appeals in **Johnson Controls, Inc.** v **Phoenix Control Systems, Inc, Rodney Larsen and Irene Larsen, John Schraz and Martha Shratz,** 886 F.2d 1173 (ith Cir. 1989)

[18] Whether the Australian Federal Parliament will legislate in favour of 'look and feel' protection is a matter purely for conjecture.

[19] **Synercom Technology, Inc** v **University Computer Co.,**482 F.Supp. 1003. 199 U.S.P.Q. 537 (N.D. Tex. 1978)

G.C. O'Donnell Copyright Essay Prize 1991

The Trustees of the GC O'Donnell Biennial Prize Trust are pleased to announce their 1991 GC O'Donnell Prize.

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