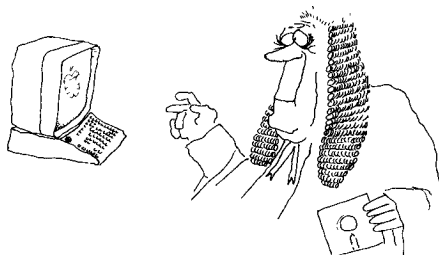


# The "Apple" Cases: A Comparison of the American and Australian Decisions

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## I. INTRODUCTION

The decisions in *Apple Computer Inc. v. Franklin Computer Corporation*<sup>1</sup> by the United States Court of Appeals for the Third Circuit (the "American case") and *Apple Computer Inc. v. Computer Edge Pty Ltd*<sup>2</sup> by the Federal Court of Australia (the "Australian case") have each heightened the debate in America and Australia respectively concerning the use of copyright laws as the proper vehicle for the legal protection of computer programs.<sup>3</sup> Otherwise, as the American case *prima facie* supports the copyrightability of computer programs, it has the potential to be used in Australia in aid of the argument that copyright laws should protect computer programs. Similarly, as the Australian case does not support the copyrightability of computer programs, it has the potential to be used in America in aid of the argument that copyright laws are not appropriate to protect computer

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1. The American case is reported at 714 F. 2d 1240. This volume however is not yet available in Australia and as such, all citations to the decision in this article will refer to reproduction of the Court's judgment as appearing in [1983] Computer Law Report ("Comput. L. Rep.") 335.
2. [1983] A.T.P.R. 44,884.
3. For a discussion of the differences between "computer programs" and "computer software" refer A. Liberman, "The Legal Protection of Computer Programs in Australia" (1983) 22 *Industrial Property* 320.

programs. It is important to ensure that if the American case and the Australian case are being used in this manner, that they be presented in their proper perspective. It will therefore be the aim of this analysis:

- (i) to compare the copyright aspects<sup>4</sup> of these decisions in order to obviate their possible misuse in relation to the aforesaid arguments;
- (ii) to assess their respective Courts' rulings in the context of laws relevant to their jurisdictions, and
- (iii) to consider the significance of each of the decisions in developing the most appropriate laws to govern the protection of computer programs.

## II. NATURE OF PROCEEDINGS AND RELIEF SOUGHT

The American case was an appeal from the United States District Court for the Eastern District (the Lower Court) refusing the grant of a preliminary injunction<sup>5</sup> against Franklin Computer Corporation for infringing the alleged copyright of Apple Computer Inc. in fourteen computer programs. The Lower Court referred to four factors which a plaintiff must show in order for a preliminary injunction to be granted:

1. A reasonable probability of success on the merits;
2. Irreparable injury to the plaintiff that exceeds injury to the enjoined defendant;
3. The improbability of harm to other interested persons; and
4. A public interest that would be furthered.<sup>6</sup>

The Lower Court refused to grant the preliminary injunction primarily by reason of Apple not being able to satisfy the first two requirements.<sup>7</sup> In relation to the first requirement, it concluded that there was doubt as to the copyrightability of the computer programs under consideration. In relation to the second requirement, it concluded that Apple was "better suited to withstand whatever injury it might sustain during litigation than

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4. The Australian case, for instance also involved the consideration of issues under the Trade Practices Act 1974 (Cth); such issues will not be considered in this analysis.

5. A "preliminary injunction" in the Australian context is analogous to an "interlocutory injunction".

6. 545 F. Supp. 812, 825 (1982).

7. The Court commented that there was only limited evidence as to the "last two showings" *Ibid.*

Franklin'';<sup>8</sup> as such Apple had apparently failed to show irreparable harm.

The Australian case was neither an appeal, nor was the case one seeking interim relief in the form of an interlocutory injunction. Rather, Apple sought final orders in the form of a perpetual injunction together with damages and an account of profits. The nature of the proceedings and the relief sought in the two cases were therefore significantly different.<sup>9</sup>

### III. FACTS UPON WHICH PROCEEDINGS WERE BASED

In the American case, the proceedings were based upon allegations by Apple that Franklin had copied fourteen computer programs being operating system programs used in Apple II computers. Franklin did not dispute that it copied the programs and used them in its ACE 100 computers. As such, the allegations against Franklin may be characterised in terms of direct infringement.

In the Australian case, the proceedings were based upon allegations by Apple that Computer Edge had imported into and sold in Australia, Wombat Computers manufactured in Taiwan, containing computer programs being unauthorised copies of Apple computer programs. The unauthorised copying of the Apple computer programs was undertaken by the overseas manufacturer of the computers and as such, the allegations against Computer Edge may be characterised in terms of indirect infringement. Computer Edge did not dispute the importation and sale as aforesaid.

### IV. LEGISLATION

The copyright issues in the American case were considered in the context of the Copyright Act 1976<sup>10</sup> (the "1976 American Act") as amended by legislation in 1980<sup>11</sup> (the "1980 amending American Act")<sup>12</sup>. Section 102 of the 1976 American Act provides:

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8. *Ibid.*

9. Whilst not decisions of Australian Courts, the rulings of English Courts in *Sega Enterprises Ltd v. Richards* [1983] 9 F.S.R. 73 and *Thrustcode Ltd v. W. W. Computing* [1983] 9 F.S.R. 502, offer a more appropriate comparison in this regard.

10. Public Law 94-553 October 19, 1976 90 Stat 2541.

11. Public Law 96-517 December 12, 1980 94 Stat 3028.

12. Collectively these two Acts will be referred to in the article as "the American legislation".

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (i) literary works;
- (ii) musical works, including any accompanying words;
- (iii) dramatic works, including any accompanying music;
- (iv) pantomimes and choreographic works;
- (v) pictorial, graphic, and sculptural works;
- (vi) motion pictures and other audiovisual works; and
- (vii) sound recording

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.

Section 101 of the 1976 American Act defines “literary works” as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks or cards, in which they are embodied.” It also provides that a “work” is ‘fixed’ in a tangible medium of expression “when its embodiment in a copy or phonorecord, by or under the authority of the author is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration...”.

The 1980 amending American Act added at the conclusion of section 101 of the 1976 American Act a definition of “computer program” in the following terms:

A ‘computer program’ is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

The 1980 amending American Act also amended section 117 of the 1976 American Act to read as follows:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorise the making of another copy or adaptation of that computer program provided:

- (i) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner or
- (ii) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

The 1980 amending American Act did not however expressly include “computer programs” either as “works of authorship” generally or “literary works” specifically within the meaning of section 102 as aforesaid.

The copyright issues in the Australian case were considered in the context of the Copyright Act 1968 (Cth)<sup>13</sup> as amended (the "1968 Australian Act"). The 1968 Australian Act does not have a provision substantially similar to section 102(a) of the 1976 American Act. In particular, no express provision is made for future technologies in the manner provided for therein such that there is no reference to "works" being "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated..." Otherwise whilst the 1968 Australian Act does not contain a provision equivalent to section 102(b), it is considered that the matters referred to therein are governed in Australia by the general law principle, that copyright does not protect ideas.

Pursuant to section 32 of the 1968 Australian Act copyright subsists in original "works" which include "literary works".<sup>14</sup> Section 10 of the Act defines a "literary work" to include "a written table or compilation"; "writing" is defined to mean "a mode of representing or reproducing words figures or symbols in a visible form and 'written' has a corresponding meaning".<sup>15</sup>

Prima facie, therefore, the definition of "literary works" under the 1976 American Act has the potential to encompass a greater range of "works" than does the definition of "literary works" under the 1968 Australian Act. This arises *inter alia* from the fact that:—

- (i) in the case of the American Act, it expressly provides that "works" can be "literary works", "regardless of the nature of the material objects... in which they are embodied";
- (ii) in the case of the Australian Act, express reference is made to "writing" having to be in a visible form, such that the nature of the material objects upon which "literary works" are embodied, may be very significant.

The concept of "fixation" is not expressly dealt with in the 1968 Australian Act — there being no temporal element in the kindred term "reproduction in a material form".<sup>16</sup> Thus, unlike the American legislation, Australian statute law does not anywhere expressly refer to "computer programs".

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13. Act No. 63 of 1968.

14. Other original "works" in which copyright subsists are "dramatic works", "musical works" and "artistic works" (1968 Australian Act s.10).

15. *Ibid.*

16. S. 21(1) of the 1968 Australian Act in relation to reproduction in a material form reads as follows:

Finally, whilst the Court in the Australian case did not undertake a substantive discussion of sections 37 and 38 of the 1968 Australian Act, it is important to remember that these were the provisions upon which Apple based its infringement proceedings. Sections 37 and 38 read as follows:

37. The copyright in a literary, dramatic, musical or artistic work is infringed by a person who, without the licence of the owner of the copyright, imports an article into Australia for the purpose of —

- (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire, the article;
- (b) distributing the article —
  - (i) for the purpose of trade; or
  - (ii) for any other purpose to an extent that will affect prejudicially the owner of the copyright; or
- (c) by way of trade exhibiting the article in public, where, to his knowledge, the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright.

38 (1) The copyright in a literary, dramatic, musical or artistic work is infringed by a person who, in Australia, and without the licence of the owner of the copyright —

- (a) sells, lets for hire, or by way of trade offers or exposes for sale or hire, the article; or
  - (b) by way of trade exhibits an article in public, where, to his knowledge, the making of the article constituted an infringement of the copyright or, in the case of an imported article, would, if the article had been made in Australia by the importer, have constituted such an infringement.
- (2) For the purpose of the last preceding sub-section, the distribution of any articles —
- (a) for the purpose of trade; or
  - (b) for any other purpose to an extent that affects prejudicially the owner of the copyright concerned, shall be taken to be the sale of those articles.

Significant differences therefore exist between American and Australian copyright legislation in the area under consideration, differences which in part stem from a greater express cognisance in the American legislation of the present and potential impact of new technologies on the fabric of traditional copyright concepts.

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- (1) For the purposes of this Act, a literary, dramatic or musical work shall be deemed to have been reproduced in a material form if a sound recording or cinematograph film is made of the work, and any record embodying such a recording and any copy of such a film shall be deemed to be a reproduction of the work.

For a further discussion of the concept of “reproduction in a material form” refer note 3 *supra*, 323.

## V. COMPUTER PROGRAMS

In the American case the proceedings related to computer programs in object code stored in Read Only Memory (ROM)<sup>17</sup> or on floppy disks<sup>18</sup> as follows:

### (1) *Autostart ROM*

The Autostart program stored in ROM, is a collection of low level subroutines (“booting” routines), that initiate registers and other circuitry in the Apple II when the power is turned on. It also performs a variety of hardware oriented functions during operating, so that the machine can accept keystrokes and generate character graphics for video display.

### (2) *Applesoft*

The Applesoft program is Apple’s version of BASIC (“Beginner’s All-purpose Symbolic Instruction Code”), a higher level programming language... The Applesoft program is stored in ROM and is an interpreter program that processes BASIC statements, one statement at a time and causes the computer to execute those instructions that implement the BASIC statement entered by the user.

### (3) *DOS 3.3*

The DOS 3.3 program is a disk-based, operating systems program. It provides the instructions necessary to control the operation between disk drive and the computer. It controls the reading and writing of the floppy disks and includes several other routines and sub-routines, for example, the read-write-track-sector (RWTS) which puts in sequence all the data transfers. RWTS starts various

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17. The ROM “is an internal permanent memory device consisting of a semi conductor chip which is incorporated into the circuitry of a computer. A program in object code is embedded on a ROM before it is incorporated in the computer. Information stored on a ROM can only be erased or re-written” (545 F. Supp 812, 813 n. 3 (1982)).

Otherwise it should be noted that there had been testimony in the Lower Court that the Franklin ACE 100 contained EPROMs (Erasable Programmable Read Only Memory) rather than ROMs. “EPROMs perform the same function as ROMs, but information stored in them can be erased and the chip can be reprogrammed whereas ROMs are manufactured with a fixed program” (545 F. Supp 812, 813 n. 3 (1982)). The Lower Court considered that for the purpose of the proceedings at hand the difference between ROMs and EPROMs was inconsequential. The appellate Court did not demur from that view.

18. A floppy disk “is an auxiliary memory device consisting of a flexible magnetic disk resembling a phonograph record, which can be inserted into the computer and from which data or instructions can be read” (note 1 *supra*, 337).

sub-programs that perform certain low-level functions such as reading and writing data.

(4) *Floating Point BASIC*

The Floating Point BASIC is a disk-based version of the Applesoft program. In some modes of the Apple II computer it is loaded into the random access memory (RAM) of a peripheral card known as "Language Card" and is there available for the users programming. Floating Point BASIC is used in earlier versions of the Apple II computer that do not have the Applesoft program in ROM.

(5) *Apple Integer BASIC*

The Apple Integer BASIC is a disk-based program and was Apple's first version of BASIC for the Apple II computer. This program implements a simpler version of Apple's Applesoft and Floating Point BASIC programs.

(6) *Hello*

The Hello program is a disk-based operating systems program that is used in conjunction with Apple's DOS 3.3 operating system. After start up, this program is the first program executed each time a floppy disk is "booted up". It determines how much random access memory (RAM) is in the computer and which version of BASIC needs to be loaded into the computer.

(7) *Chain*

The Chain program is a disk-based operating systems program that is used in conjunction with Apple's DOS 3.3 program. The Chain program allows data to be passed between program segments, only one of which is in RAM at any given time. The Chain program preserves RAM-based data during the time another program segment is being loaded into RAM.

(8) *Copy*

The Copy program is a disk-based operating systems program that is used in conjunction with Apple's DOS 3.3 program. The Copy program is a utility program that enables the user to copy programs written in Apple Integer BASIC from one disk to another.

(9) *Copy A*

The Copy A program is a disk-based operating systems program that is used in conjunction with Apple's DOS 3.3 program. The Copy A program is a utility program that enables the user to copy programs written in Applesoft from one disk to another.

(10) *Copy OBJO*

The copy OBJO program contains a file of sub-routines used by the Copy and Copy A programs.



(11) *Boot 13*

The Boot 13 is a disk-based boot program that allows a user to “boot” older versions of the Apple disk operating system when the user has a 16 sector boot ROM on the Controller Card.

(12) *MasterCreate*

The MasterCreate program is a disk-based, operating systems program. When a floppy disk is first initialized, or formatted, the DOS 3.3 is placed on the disk in a form that is dependent on the amount of RAM available. The MasterCreate program replaces the DOS 3.3 on the disk with a version that is independent of the amount of RAM available.

(13) *Apple 13 — Sector Boot ROM*

The Apple 13 — Sector Boot program is in a ROM located on the Disk Controller Card. This boot program initializes numerous circuits in the Controller Card and in the Apple II computer and causes other parts of the disk operating system used for 13 sector formatted disks to load.

(14) *Apple 16 — Sector Boot ROM*

The Apple 16 — Sector Boot program is in a ROM located on the Disk Controller Card. This program initializes numerous circuits on the Controller Card and in the Apple II computer and causes other parts of the disk operating system used for 16 sector formatted disks to load.<sup>19</sup>

The computer programs in the American case were characterised by the Court as “operating system programs” rather than “application system programs”.<sup>20</sup> It was also alleged that the computer programs in the form of ROMs constituted works capable of protection under the American legislation.

The American case did not need to specifically consider the issue of copyrightability of computer programs in source code. In the Australian case the proceedings related to the following computer programs in both source code and object code:

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19. 545 F. Supp 8122, 815-16 (1982). It should be noted that the appellate Court described the computer programs under consideration in slightly different terms, adding the comment that the descriptions given by it “represent an effort to translate the language used by computer experts into language reasonably intelligible to lay persons” (note 1 *supra*, 338 n.4).

20. “Application programs usually perform a specific task for the computer user, such as word processing, check book balancing or playing a game. In contrast operating system programs generally manage the internal functions of the computer or facilitate use of applications programs” (note 1 *supra*, 337).

- (1) "Applesoft source" — a computer program in source code, originally written in a computer language called 6502 Assembly language.
- (2) "Applesoft object" — a computer program in machine or object code, capable of being expressed in hexadecimal notation.
- (3) "Autostart ROM source" — a computer program in source code, originally written in a computer language called 6502 Assembly language.
- (4) "Autostart ROM object" — a computer program in machine or object code, capable of being expressed in hexadecimal notation.

Unlike the American case therefore:

- (i) the Court in the Australian case was confronted with the issue of the copyrightability of computer programs in source code;
- (ii) whilst the programs in the Australian case were embodied in ROMs or EPROMs or a combination of ROMs and EPROMs, it was not alleged that those forms constituted works capable of protection under the 1968 Australian Act. It was in fact alleged that the ROMs and EPROMs were either "reproductions in a material form" or "adaptations" of the relevant source and objects codes<sup>21</sup>;
- (iii) whilst it appears that the computer programs in the Australian case were in fact "operating system programs", the Court in its judgment did not consider the distinction between "operating system programs" and "applications system programs".

## VI. RULINGS

So far as relevant for present purposes, the Court in the American case considered the following three issues:

1. Whether copyright can exist in a computer program expressed in object code?
2. Whether copyright can exist in a computer program embedded on a ROM?

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21. Amongst the exclusive rights granted in the 1968 Australian Act to the owner of copyright in an original literary work, are the rights "to reproduce the work in a material form" and "to make adaptations of the work" (s.31(1)(a)(i) and (iv)). Thus whilst the ROMs and EPROMs were not alleged to be "literary works" it was alleged that they were unauthorised "reproductions" or "adaptations" of the relevant source and object codes and as such infringed Apple's alleged copyright therein.

3. Whether copyright can exist in an operating system program? In relation to the first issue the Court concluded that “a computer program whether in object code or source code (was) a “literary work” and (was) protected from unauthorised copying whether from its object or source code version”<sup>22</sup>. The rationale behind this ruling was:

(i) That “(a)lthough section 12(a) (did) not express computer programs as works of authorship<sup>23</sup>, the legislative history suggest(ed) that programs were considered copyrightable as literary works”<sup>24</sup>

The legislative history relating to the protection of computer programs included the Final Report of the Commission on New Technological Uses (the CONTU Report)<sup>25</sup> and the 1980 amending American Act<sup>26</sup>. In contrast the 1968 Australian Act has had no such legislative history.

(ii) The language of the American legislation did not require copyrightability to depend upon a work having either a communicative function to individuals or upon its being intelligible to human beings.

In support of this argument, the Court emphasised:

(a) the words “from which they can be” and “with the aid of a machine or device” in section 102(a) rather than the more crucial words “perceived” and “communicated”; and

(b) the definition of “computer program”.

Incidentally, the Court also found comfort from the fact that literary works included not only words but also “numbers or other . . . numerical symbols or indicia”. It was not considered relevant that all the forms of “literary works” contained in this terms definition, were *prima facie* capable of fulfilling a human communicative/intelligibility role.

Save for the definition of “computer program”, which unfortunately is disconnected from section 102(a), it is therefore submitted that this element of the Court’s rationale was not totally convincing.

22. Note 1 *supra*, 343.

23. As previously mentioned, the term “computer program” is also not expressly included in the definition of “literary works”. Notwithstanding the Court’s comments, such an omission must foster doubts as to the adequacy of the American legislation in properly protecting computer programs.

24. Note 1 *supra*, 341.

25. National Commission on New Technological Users of Copyrighted Works (1978).

26. Other elements of the legislative history are set out at note 1 *supra*, 341-2.

In relation to the second issue, the Court re-affirmed the view which it had expressed in *Williams Electronics Inc. v. Artis International Inc.*<sup>27</sup> that a “computer program in object code embedded on a ROM chip (was) an appropriate subject of copyright”.<sup>28</sup> The Court did not however indicate which, if any, of the seven categories of works of authorship the ROMs came within;<sup>29</sup> it apparently being sufficient that the statutory requirement of “fixation” was satisfied “through the embodiment of the expression in the ROM devices”.<sup>30</sup> Apart from the question of “fixation”, the other elements of section 102(a) were not considered. Such an omission together with the failure to at least advert to the categorisation issue mentioned above, again leaves the Court’s reasoning open to question.

In relation to the third issue, the Court concluded that “Franklin’s contentions that operating system programs (were) *per se* not copyrightable (was) unpersuasive”.<sup>31</sup>

The rationale behind this ruling was:

- (i) That an operating system program was neither a “process”, “system” or “method of operation” within the meaning of section 102(b) but merely instructions expressed in a particular form and as such should be copyrightable;
- (ii) That an operating system program was not a “purely utilitarian work” and even if it was, this should not preclude its copyrightability;
- (iii) That the definition of “computer program” in the 1980 amending American legislation did not distinguish between “operating system programs” and “application system programs”; as such “operating system programs” should be treated identically to “application system programs”. The treatment of the latter assuming its copyrightability;
- (iv) That permitting operating system programs to be proper subject matter for copyright protection did not result in the anathema of copyright being granted to mere ideas. There were presumably other means of expressing the ideas contained in an operating system program and these other means of expression would not thereby be precluded.

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27. 685 F. 2d 870 (3d Cir. 1982). This case was also used to support various of the Court’s arguments relating to the first issue.

28. Note 1 *supra*, 343.

29. This is not to say that it had to fall within one of the seven categories, s. 102 (a) providing for an “inclusive” rather than an “exhaustive” definition of “works of authorship”.

30. Note 27 *supra*.

31. *Id.*, 348.

Traditionally, patent law rather than copyright law has been the preserve of protecting novel “utilitarian works”. Operating system programs are akin to “utilitarian works”<sup>32</sup> — they are functional in that in a particular medium they can cause computers to perform certain tasks. The Court nevertheless considered that it was not inappropriate for copyright law to be the source of protection of such works. The Court’s ruling on this third issue would seem to be based on a number of misconceptions, the most obvious of which was its adoption of the following words from the CONTU Report:

Programs should no more be considered machine parts than video tapes should be considered parts of projectors or phonorecords parts of sound reproduction equipment . . .<sup>33</sup>

Operating system programs are, however, clearly different from both video tapes and phonorecords; they can cause and are indeed necessary to cause machines to perform particular tasks while video tapes and phonorecords do not possess such functional qualities.

In the end result the Court reversed the denial of the preliminary injunction and remanded the issue as raised herein for reconsideration by the Lower Court. Regrettably from the point of view of resolving the above issues, the matter was settled prior to such reconsideration. The uncertainty remains, and as one commentary put it:

It may be many years before another case of this clarity comes before the Court. Meanwhile, vendors will try to stretch the language of the appellant’s decision in other cases to achieve whatever protection they can under the current copyright laws. Others will pressure Congress to amend the copyright laws to clarify the protection to be afforded to software. . .<sup>34</sup>

The situation remains unsatisfactory.

So far as relevant for present purposes the Court in the Australian case had to consider the following questions:

1. Were any of the works referred to in Apple’s claim “literary works” within the meaning of the 1968 Australian Act?
2. If so, were any of them “original literary works” within the meaning of the said Act?
3. If copyright subsisted in the alleged works, was Apple then and at all material times owner of this copyright?
4. If so, would the making of the chips in the Wombat computer, if they had been made in Australia by Computer Edge, have constituted an infringement of this copyright?

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32. This is not to say that application system programs are also not akin to “utilitarian works”.

33. Note 25 *supra.*, 21.

34. (1984) 2 (5) *Software Protection*, 2.

5. If so, was this known to the second respondent, Michael Suss? The matter was disposed of quickly and unsatisfactorily when the Court concluded that none of the programs under consideration were “literary works” within the meaning of the 1968 Australian Act.

The rationale behind this ruling was:

- (1) that a “literary work” was something which was intended to afford “either information or instruction or pleasure in the form of literary enjoyment”<sup>35</sup> and computer programs did not conform with such intent.

It is to be regretted in this regard that the Court did not undertake a more detailed analysis of the term “literary work”; in particular:—

- (i) in other decisions “literary works” had been held to include a race programme,<sup>36</sup> chronological lists of football fixtures<sup>37</sup>, columns of birth and death announcements in a newspaper<sup>38</sup> and football pool coupons.<sup>39</sup> It would be difficult to argue that any of the preceding would have satisfied the narrow “literary enjoyment” test endorsed by the Court in the Australian case;
- (ii) that the Court did not expressly consider whether by reason of the definition of “writing”, literary works should be visible to human perception;
- (iii) that the Court did not expressly consider whether computer programs were “compilations” within the meaning of the 1968 Australian Act;
- (iv) that the Court did not expressly consider whether literary works should be humanly intelligible.

It is also to be regretted that the Court did not seek to differentiate between the various forms of computer programs under consideration as Apple had sought to do in its submissions. If such a detailed analysis and differentiation had occurred, then the relevant source codes may not have been dismissed so lightly as not being “literary works”.

Whilst the preceding may not have altered the Court’s ultimate ruling, it would have highlighted one of the major

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35. *Hollinrake v. Truswell* [1894] 3 Ch. 420 *per* Davey L. J., 428.

36. *Mander v. O’Brien* [1934] S.A.S.R. 87.

37. *Football League Ltd v. Littlewoods Pools Ltd* [1959] 1 Ch. 637.

38. *John Fairfax & Sons Pty Ltd v. Australian Consolidated Press Ltd* [1960] SR (N.S.W.) 413.

39. *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273.

problems involved in seeking to protect computer programs under the 1968 Australian Act — namely whilst copyright seeks to protect the form of expression, that may not be the best conceptual basis for seeking to protect computer programs.<sup>40</sup>

- (2) That computer programs were intended to assist the functioning of a mechanical device — whereas “literary works” were not. This reasoning appears to be particularly appropriate in relation to the relevant object codes.
- (3) That the omission by the legislature to expressly include computer programs within the ambit of copyright protection at a time when computers had been developed and were well known and at a time when literary works in the form of “cinematograph films” and “sound recordings” were being protected, was a clear indication that computer programs were not to be protected under the 1968 Australian Act.

In contrast with the setting of the American case therefore, the Australian case was not one which evolved from a “legislative history” which had perceived and tried to remedy the peculiar problems of computer programs. In the end result therefore, the copyright claim and the application generally was dismissed. The Court’s ruling is however the subject of an appeal.<sup>41</sup> The more significant aspect of the Australian case is the fact that it has provoked the Commonwealth Government to undertake an urgent review of existing legislation so as to ensure that computer programs are properly protected.<sup>42</sup> The “legislative history”

40. This problem is of far less significance under the 1976 American Act wherein “works of authorship” may be “fixed in any tangible medium of expression, now known or later developed . . .” and “literary works” are works capable of protection “regardless of the nature of the material object . . . in which they are embodied”.

41. The appeal commenced on the 20th February 1984.

42. An extract from the joint press release of the Attorney-General, Minister for Industry & Commerce and Minister for Science & Technology dated the 21st day of December 1983 reads:

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. . . . 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 back dating of legislation. . . . 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 patent. . . . Ministers stressed however that prompt legislative action would be taken in the short term if necessary. . . .

which was so prominent in the American setting may now have the opportunity of being created in Australia. Therefore, the situation whilst remaining unsatisfactory, at least shows some signs that it is passed beyond being a matter of purely academic interest.

## VII. CONCLUSIONS

The following principal conclusions result from the preceding analysis.

1. The significant and numerous differences between American and Australian legislation in this area, must result in very great care being used in touting the decisions of the Courts of one country in support of arguments in the other.
2. Regrettably, neither the American nor Australian case can be said to have resolved the question of whether the copyright laws of each respective country protect computer programs. The decisions may best be viewed as milestones in the process of seeking to find the proper legislative framework for the protection of computer programs. America has an established history in seeking to fulfill this goal; government sponsored reports have been commissioned; legislation has been enacted; cases have been considered by the Courts and extensive commentaries have been written on the topic. In contrast, Australia is in the very formative stages of such development; there have been no government sponsored reports commissioned; legislation has not been enacted; previous cases have not been considered by the Courts and until very recently there have only been a very few commentaries written dealing with the topic. The novelty of the subject matter in the Australian context has been clearly reflected in the Court's judgment. In contrast with the American ruling — both in the Lower Court and the appellate Court — there was an obvious reluctance by the Australian Court to venture into the

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Following the above press release, on the 4th January 1984 the Attorney General's Department issued a brief policy statement indicating two possible methods by which the 1968 Australian Act might be amended in order to protect computer software. The two alternatives posited may be summarised as follows:-

Option A: To alter the definition of a "literary work" to include computer programs.

Option B: To create a new category of copyright subject matter together with amendments to cover material stored in or created using computer systems.



unfamiliar realms of computer software terminology and to consider in detail the nature of the programs in dispute. The Court was therefore not able to grasp the opportunity offered to it — that of making a definitive statement as to the position of computer programs in the context of present Australian copyright legislation. Neither Court's judgment is however totally satisfying.

3. The Australian case, by reason of its being the first decision, has probably had a more profound impact on the question of the protection of computer programs in Australia, than the American case would have had in America. Both decisions, whilst focusing on the copyright aspects of the protection of computer programs, should not result in a myopia about the "copyright solution" being the only solution. The potential clearly exists for fresh ideas to deal with what are fresh legal problems.

