

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 92

Suit 1338/1987

Between

Federal Computer Services
Sdn Bhd

... Plaintiff

And

Ang Jee Hai Eric

... Defendant

GROUND S OF DECISION

Copyright — Ownership

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Federal Computer Services Sdn Bhd v Ang Jee Hai Eric

[1993] SGHC 92

Suit 1338/1987
Lai Kew Chai J
29 April 1993

1 In mid-1987, the plaintiffs commenced this action against the defendant alleging infringements of copyright in their computer software, misuse as a former employee of confidential information in respect of the computer software and breaches of fiduciary duties. They sought the usual injunctive reliefs and damages. The action came on for trial in October 1991 and after a hearing of 25 days, it had to be adjourned. I was told by counsel that another 25 more days were required to complete the trial. At the initial stage of the hearing, and at the request of both parties, I interpreted the combined effect of s 239(1) and s 209(2) of the Copyright Act 1987 ('the Act'). The court's interpretation was necessary to determine the nature of the evidence which had to be led. I ruled that the effect of the two subsections, which took effect on and after 10 April 1987, was that in Singapore a computer program made and completed before 10 April 1987 was copyrightable as a literary work only by virtue of s 239(1) of the Act and that such a computer program could not enjoy copyright independently of s 239(1) of the Act. I further ruled that on a plain reading of the second subsection, it was clear that nothing done in relation to that computer program before 10 April 1987 shall constitute an infringement of the copyright.

The plaintiffs filed a notice of appeal and, on their request, I granted them leave to appeal. [The appeal has since been discontinued - Ed.]

2 It has transpired that, pending new dates being obtained, parties have settled the main action. By their settlement, a protracted hearing has sensibly been averted. But it appears that the settlement is predicated on and does not affect the plaintiffs' right to have their said appeal heard.

3 One can usefully begin by an outline of the law of copyright prior to the enactment of the UK Copyright Act 1911 which applied to Singapore. It was both common law and statutory. After the enactment of the UK Copyright Act 1911 copyright protection was entirely to be found within the four corners of the 1911 Act. By s 1(1) of the 1911 Act, it was provided that 'copyright shall subsist ... in every original, literary, dramatic musical and artistic work ...'. The expression 'literary work' was defined as including 'maps, charts, plans, tables and compilations.' The 1911 Act exclusively set out the law of copyright of Singapore until it was repealed by s 203 of the Act which came into force on 10 April 1987.

4 It is also convenient at this stage to set out briefly the law of copyright of computer software (which has to be further defined) under the 1911 Act. Comparative case law in Australia and in Canada have shown its state of controversy and undesirable lack of the usual certainty in an important and growing area of law; though it must be said at once that the advent of computer technology was not in contemplation at the time the 1911 Act was enacted. There has been no local case law on this question. Equally, no English court has decided on the question whether a computer program is a literary work under the 1911 Act or even under the 1956 Act which replaced the 1911 Act in the law of England. However, for the purposes of interlocutory proceedings it had

been assumed in English cases that both the source code and the object code (for the explanation of which codes please see the judgment of the Court of Appeal in ***Federal Computer Services Sdn Bhd v Ang Jee Hai Eric*** ,) are literary works: see ***Sega Enterprise Ltd v Richards & Anor*** , and ***Thrustcode Ltd & Anor v WW Computing Ltd*** , which followed *Sega* `s case.<sup>2</sup> The English Court of Appeal in ***Milltronics Ltd & Anor v Hycontrol Ltd*** , considered the English 1985 Amendment Act and held `that the 1985 Amendment Act had grafted, as it were, computer programs on to literary works for the purposes of the application of the Act of 1956`. The Court of Appeal expressly stated that it expressed no view whether a computer program (in terms of the source and/or object codes) would qualify as a literary work under the Act of 1956: see pp 282, 283 and 285. To sum up, no case law in England was brought to my attention on the question whether a computer program enjoys copyright as a literary work under the Act of 1956, independently of s 1(1) of the English Act of 1985, which subsection corresponds to s 239(1) of the Act. I was told by counsel that in the United Kingdom, the 1956 Act has been replaced by the 1988 Act which, like the Act in the law of Singapore, includes a computer program within the meaning of the term `literary work`.

5 The Australian position is best summarized in ***Copinger & Skone James on Copyright*** (13th Ed) in the footnote on ***Computer Edge v Apple Computer, Inc & Anor*** , at p 22 as follows:

... the majority, ruling on the Australian Copyright Act 1956, prior to its amendment by the Australian Copyright Amendment Act 1984 (which gave a degree of protection to computer programs) applied these requirements [ie requirements for qualification as a literary work] and distinguished between source code of each program which did qualify as a literary work, and the object code of each program stored as electrical impulses in a silicon chip, which they held did not qualify as a literary work.

6 The voice of the dissenting minority has to be taken note of, by reason of the eminence of the minority members and its support by the Canadian courts culminating in the decision of the Supreme Court in ***Apple Computer, Inc v Mackintosh Computers Ltd.*** Mason J (now CJ) and Wilson J expressed the view that `the conversion of the source code into object code, albeit by mechanical operation of a computer, was a process of translation from one language into another.` They further opined that the object code had taken on the same literary character as was enjoyed by the source code from which it is derived. The Supreme Court of Canada ruled that the Australian authority should not be applied in Canada and said that `the silicon chip should be viewed as a static object encoded with written instructions rather than as constituting a dynamic interchange of electrical impulses` and that `(i)t follows that the program embodied in the silicon chip is properly subject to protection by copyright and the unauthorized copying of that program constitutes a violation of copyright.`

7 I now set out s 239 of the Act which reads:

(1) The Copyright Act 1911 shall apply to a computer program made before 10th April 1987 as it applies in relation to a literary work and shall so apply whether or not copyright would subsist in that program apart from this Act. (2) Where, by virtue of subsection (1), copyright subsists under the Copyright Act 1911 in a computer program that was made before 10th April 1987, nothing done in relation to the computer program before that date shall be taken to constitute an offence under the repealed Copyright Act or an infringement of that copyright. (3) For the purposes of this section, a computer program the making of which extends over a period shall be deemed not to have been made before 10th April 1987 unless the making of it was completed before that date.

8 As I stated earlier in this judgment, I interpreted the text of these provisions in the following way. Every judicial interpretation of a statute is a

search for the true legislative intention. The starting point is to look and interpret the text, that is, the words used, and then, if necessary, the company they keep. By the text of sub-s (1), it was plain to me that a computer program made before 10 April 1987 is copyrightable as a literary work only by virtue of s 239(1) of the Act. In other words, such a computer program under that subsection in terms cannot enjoy copyright independently of s 239(1). I further expressed the construction that by s 239(2) any infringement of such a computer program prior to 10 April 1987 is not criminally or civilly actionable. My reasons were as follows. It seemed clear to me that the text of the first subsection, in the light of case law in other jurisdictions on the same statutory provisions, expresses Parliament's intention to extend the definition of 'literary work' under the 1911 Act to include computer programs. By the words ***'and shall so apply whether or not copyright would subsist in that program apart from this Act'***, Parliament has removed any doubt whether computer programs enjoyed copyright protection under the 1911 Act. Then the second subsection went on to grant the general amnesty.

9 In argument, learned counsel for the plaintiffs concentrated his attack on the text. It was suggested that s 239(2) of the Act was 'curiously worded'. It was said that if the true position was that the Act retrospectively conferred copyright entitlement on a program which, at the date of its creation, did not have copyright status, the Act was not to criminalize or treat as infringement of copyright anything done before it came into force. Counsel made the point that this was a reasonable scenario. I did not think so, as it would be too narrow a view to take. It was further contended that if computer programs made before the Act were and are correctly regarded as having enjoyed copyright protection under the 1911 Act as from their creation, then s 239(2) is without effect in relation to those programs. Any contrary suggestion, it was strongly argued,

would be contrary to the text and to common sense. It was further pointed out that it would have been a simple matter to have worded s 239(2) of the Act in the following terms:

In relation to a computer program made before the commencement of this Act nothing done before such commencement shall be taken to constitute an offence under the Copyright Act which is repealed by this Act or an infringement of that copyright.

10 It was further observed that that simplicity was avoided in the drafting of the subsection and the reason was simply that what was intended by Parliament was to avoid retrospectively treating as an offence or infringement any act which only by virtue of s 239(1) could be regarded as a copyright offence or infringement. That interpretation, it was argued, would accord with the words and with common sense. I did not agree. There was much force in some of the arguments. However, I took the view that such an interpretation would be anomalous. On that interpretation, it would mean that a computer program made before 10 April 1987 and infringed before that date cannot be the subject of legal action if it is protected by virtue of s 239(1), by the operation of the second subsection, but can give rise to legal action if it is protected independently of s 239(1). I could not accept that Parliament had intended such an anomalous situation to arise. In my view, Parliament intended to put an end to the debate itself on the question whether computer programs (whether in terms of source or object codes) enjoyed copyright protection from their creation under the 1911 Act and also intended to wipe the slate clean in relation to all past infringements under both civil and criminal law. I could not realistically imagine that Parliament would still intend infringers to be sued or prosecuted on any copyright which subsisted independently of s 239(1).

11 Order accordingly.

Lai Kew Chai J

Lo Kok Siong and Andre Yeap (Allen and Gledhill) for the plaintiffs
Sunil Emmanuel, Amarjit Singh and Shamim Dhilawala
(Palakrishnan & Pnrs) for the defendant
