

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (INTELLECTUAL PROPERTY)
THE HON MR JUSTICE KITCHIN
HC 04 CO2882/HC 04 CO3084

Royal Courts of Justice
Strand, London, WC2A 2LL

14 March 2007

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE JACOB
and
LORD JUSTICE LLOYD

Between :

Nova Productions Limited

Claimant/
Appellant

- and -

Mazooma Games Limited & Others
-and between-

Defendants/
Respond-
ents

Nova Productions Limited

Claimant/
Appellant

-and-

Bell Fruit Games Limited

Defendant/
Respondent

(Transcript of the Handed Down Judgment of
WordWave International Ltd

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Official Shorthand Writers to the Court)

Martin Howe QC and Robert Onslow (instructed by Messrs Kuit Steinart Levy)
for the Appellant

Henry Carr QC and Michael Hicks (instructed by Messrs Wragge & Co)
for the Respondents

Hearing dates : 6/7 February 2007

Judgment

Lord Justice Jacob:

1. Nova appeals from the dismissal by Kitchin J of its actions for infringement of copyright against Mazooma (and others) and against Bell-Fruit, [2006] EWHC 24 (Ch); [2006] RPC 379. The copyright works relied on are Nova's computer game based on pool and called "Pocket Money". The defendants' games are respectively called "Jackpot Pool" and "Trick Shot." Nova's case was argued by Mr Martin Howe QC, that of the defendants by Mr Henry Carr QC
2. The kinds of copyright work originally relied upon were:
 - i) Artistic works being the bitmap graphics and the frames generated and displayed to the user;
 - ii) Literary works, being Mr Jones' [Nova's designer] design notes and the program which he wrote to implement the game;
 - iii) A dramatic work embodied in the game itself;
 - iv) Film copyright.
3. Below, Nova relied upon the first three types. Having regard to the decision in *Norowzian v Arks* [1998] FSR 394 it merely reserved its position in relation to film copyright for possible argument on appeal. In the event it chose not to do so. It has also abandoned its dramatic work case. So we only have to consider the cases advanced based on artistic and literary works.
4. The relevant legislation is rather lengthy. I set it out in an Appendix so as to get to the issues sooner. So far as the facts are concerned Kitchin J had to deal with more than we do. None of his factual findings is challenged. A fuller account of them than is necessary here can be found in his judgment and the Annex to it showing relevant screens of the various games. We had the advantage of actually seeing the games and the moving images involved and also a DVD of them. These helped, but actually, having read in advance the Judge's extremely clear description with the Annex, I at least, saw just what I expected to see.

Key Findings of fact

Generally

5. First some general findings applicable to both actions. I set them out in the words of the Judge:
 - (1) ... the visual appearance and the rules of Pocket Money, Trick Shot and Jackpot Pool are all very different. There are certainly similarities between them which I address below. Nevertheless,

each of the games looks and, to my mind, plays in a very different way, [136].

6. I pause to interpolate that it is a remarkable feature of this case that it is unnecessary actually to know how any of the games concerned are played or even what they are other than computer games based on pool. Moreover although the two defendants' games are very different from each other as well as from the claimants', both are said to infringe the same copyrights. This is because the allegation is at such a general level.

7. Moving back to the findings:

- (2) It is not contended that the defendants ever had access to or copied the code itself, [129].

- (3) the use of a power meter was extremely common practice in games design and to have the power level pulsing was an obvious way to implement the feature and so permit the player to select what level of force he wishes to use. having a pulsing bar going from left to right was a common choice by numerous games designers and ... the colour scheme involving the use of yellow changing to red was also a common choice as it conveyed to the player the strength of the shot, [151].

- (4) the idea of having a visual indication of the direction of the shot was commonplace. nearly all two dimensional and three dimensional pool games produced over the last 20 years have had some form of dashed or dotted or solid view line projecting from the cue ball for aiming purposes. having an aiming or view line was a simple or common idea, [149].

- (5) it was desirable to have dots or crosses as opposed to a solid view line to avoid the problem of aliasing, [136].

- (6) Further, it was common ground ... that having the cue rotate around the cue ball was an obvious, common and functional way of showing the player how to direct the shot [144]. ... the majority of computer pool games in the last 20 years show a cue pointing at the cue ball and rotating around it under player control. It is fundamental to a pool game to show the direction of a shot, and generally speaking it is usual to show the cue rotating around the cue ball to indicate this. this feature was commonplace, [145].

- (7) Showing the table in plan view is commonplace, [140] and [141].

- (8) Showing the pulsing power level by an animation cycle in which (i) the cue moves away from and towards the cue ball, and

(ii) a bar graphic varies with the power level [is not commonplace but] was one of the obvious ways to implement the commonplace idea of having a pulsing power meter in a pool game, [155].

(9) Having values associated with pockets was very common in video pool games, [162].

Extent of “copying” generally

8. The Judge of course had to consider in detail the features of Pocket Money said to have been copied into Trick Shot and Jackpot Pool respectively. This he did at [138 – 197] for Trick Shot and at [172-197] for Jackpot Pool. In each case the claimants had listed a number of features which they alleged had been copied. The Judge found that none of these features had been copied actually as implemented in Pocket Money. However a few had been “inspired” or “affected” by Pocket Money. I turn to consider these in the case of each game complained of.

“Copying” by Trick shot

9. 12 features were alleged to be similar and to have been copied. In the result the Judge found that most of the features of similarity relied upon owed nothing to Pocket Money at all. They were the result of the designers’ of Trick Shot own work based on their general experience and what was commonplace. His findings in relation to the surviving features were summarised conveniently by Mr Howe as follows, using the Judge’s numbering:

- (1) Theme of pool: general idea in part inspired by PM.
- (4) Cue moves round ball under rotary controller: idea of rotary controller inspired by PM but movement of cue round ball not derived from PM.
- (7) Animation cycle: idea of synchronising cue with power meter probably derived from PM.
- (8) Values near/in pockets: general idea inspired by PM, implemented very differently.

“Copying” by Jackpot Pool

10. Mr Howe’s summary of the features found by the Judge was:

- (1) Theme of pool: inspired by PM.
- (4) Row of sighting dots: affected by PM in that it led to shortening of line of dots.
- (6) Animation of cycle: synchronise pulsing cue with pulsing power meter.

- (9) Graphic of money travelling across screen: not as pleaded derived but idea of coin graphic moving across screen probably inspired by PM.

The case on artistic works

Identify the copyright work – a series?

11. First one must identify the artistic work relied upon and then decide whether it has been reproduced by copying of the work as a whole or of any substantial part of it. That is the effect of s.3(1) and s.16(1) of the Act. It is an aspect of UK copyright law untouched by any EU harmonisation.
12. First then, what is the artistic work? It was common ground that the individual frames stored in the memory of a computer were “graphic works” with the meaning of the Act (Judgment [100-104]). But the actual appearance of individual frames between Pocket Money and the alleged infringements are very different (see Judgment Annex). Regarded just as pictures – as “graphic works” in the words of the Act - they are obviously very different. Save for the fact that they are of a pool table with pocket, balls and a cue, nothing of the defendants’ screens as single frames can be said to be a substantial reproduction of a corresponding screen in Pocket Money. Both before the Judge and us Mr Howe accepted that “each of the defendants had done their own drawings of cues and billiard balls” and did not contend for infringement at the level of individual screen graphics.
13. Mr Howe invited us to find that there was in effect a further kind of artistic work, something beyond individual freeze-frame graphics. This was said to be because there is a series of graphics which show the “in-time” movement of cue and meter. So, it was said, that what the defendants had done was to:

create “a dynamic ‘re- posing’ of the Claimant's version - one in which the detail of the subjects had changed, but an essential artistic element of the original was carried through to the Defendants.

This was said to involve extra skill and labour beyond just that involved in creating the individual frames.

14. The Judge was prepared to accept:

that “in time” movement of the cue and meter must be considered as being reflected in a series of still shots and like must be compared with like,

but nonetheless held there was no infringement.

15. Mr Carr, by a respondents’ notice, challenged that assumption. He submitted that a series of still images, whether created by drawing for a cartoon film or by a computer, was not in itself anything more than a series of frames, each of which would have its own

copyright and no more. No “extra” copyright work or protection is created by having a series. Putting it another way, a series of stills is just that.

16. I think that must be right. “Graphic work” is defined as including all the types of thing specified in s.4(2) which all have this in common, namely that they are static, non-moving. A series of drawings is a series of graphic works, not a single graphic work in itself. No-one would say that the copyright in a single drawing of Felix the Cat is infringed by a drawing of Donald Duck. A series of cartoon frames showing Felix running over a cliff edge into space, looking down and only then falling would not be infringed by a similar set of frames depicting Donald doing the same thing. That is in effect what is alleged here.
17. This reasoning is supported by the fact that Parliament has specifically created copyright in moving images by way of copyright in films. If Mr Howe were right, the series of still images which provides the illusion of movement would itself create a further kind of copyright work protecting moving images. It is unlikely that Parliament intended this.
18. So I think the case on artistic works falls at the first hurdle, given the concession that there is no frame-for-frame reproduction.

Reproduction of a substantial part

19. If it got as far as the second hurdle, the case would fall there too – no reproduction of a substantial part. The Judge so held at [245] for Trick Shot and [252] for Jackpot Pool. Mr Howe first has to overcome the difficulty that he is asking us on appeal to take a different view from that of the trial judge as to what amounts to a “substantial part”. That brings him right up against the clear direction from the House of Lords in *Designer Guild v Russell Williams* [2001] FSR 113 that the Court of Appeal should be very chary of doing so.
20. Thus Lord Bingham (with whom the rest of the House agreed) said:

It was not for the Court of Appeal to embark on the issue of substantiality afresh, unless the judge had misdirected himself, which in my opinion he had not, [6]

See also Lord Hoffmann at [29].

21. Mr Howe contended that the Judge had indeed misdirected himself – in two ways, on the facts and as a matter of law. As to the facts, he relied upon a passage in the evidence of Mr Starling, the designer of Jackpot Pool. It was about the “animation” cycle”. The judge records this:

[231] In early December Mr Wilson and Mr Burns arranged for Pocket Money to be brought into the office where it stayed for five or six days. Mr Starling played the game solidly for one day and reached the conclusion that it was not sufficiently skill based. He wanted to produce a game which was more realistic. He recalled

finding the level of control obtained by the rotary controller impressive.

[232] Under cross examination he accepted that he definitely noticed other aspects of the game. In particular, he limited the length of the line of dots of the sight line having seen Pocket Money and he also noticed the combination of cue, line of dots and cue pulsing in and out in time with the power meter. He accepted that having seen the game he “tied the features that I already had in my mind into the game” and that this “solved all the problems”.

22. The submission was that that which “solved all the problems” must be a substantial part of Pocket Money. Mr Howe developed the argument:

When you talk about an idea that consists in essence of using a number of features in combination, it is possible to look at that from two points of view. One is to say it is just the idea of combining things. The other way to look at it is to say what you have created by way of expression in the program is a combination of features, and that combination is what you should look at. Ask whether that is a substantial part of the copyright work if that combination is reproduced in the defendant's work.

Thus, it was argued, the combination represented a significant part of Mr Jones’ skill and labour and must be a substantial part of the work created by him.

23. The submission applied also to the case on literary works. I reject it for reasons given in more detail in relation to them (in short, idea not expression) but even as a matter of alleged misdirection by the judge it must fail – for the Judge clearly took the answer into consideration. So where is the misdirection?
24. Moreover the answer must be seen in context. The “combination” is actually just a construct of Mr Howe’s argument. After all the idea of a cue moving round a ball, of a pulsing power meter, of a sight line indicated by dots or crosses were all commonplace. And the Judge held that Mr Starling knew about all of them before he saw Pocket Money and they had already been developed by him for his game (Judgment [231]). All that was “taken” by Mr Starling was a shortened row of dots (he already had one) and synchronisation of the pulsing cue with the power meter.
25. As to the law, Mr Howe relied upon what was said by Lord Scott in *Designers Guild*:

There had been no direct evidence of copying and the judge's finding had been based on the extensive similarities between *Ixia* and *Marguerite*. These similarities, coupled with the opportunity to copy and in the absence of any acceptable evidence from RWT as to an independent provenance for *Marguerite*, had led the judge to conclude, on a balance of probabilities, that *Marguerite* had been copied from *Ixia*. If the similarities between the two works were

sufficient to justify the inference that one had been copied from the other, there was, in my judgment, no further part for the concept of substantiality to play

26. Mr Howe tried to elevate this into a general principle – that whenever copying has been found it must follow that a substantial part has been taken. I cannot agree. In many cases a coincidence in the copyright work and the alleged infringement of small, unimportant, details is an indication of copying. Thus the “reverse countersink” in *LB Plastics v Swish* [1979] RPC 551 and the misspellings in *Ibcos v Barclays* proved the copying. But no-one would say that those details alone meant that a substantial part of the copyright work had been taken – they are the starting point for a finding of infringement, not the end point. Lord Scott’s observations must be taken as concerned with the facts of *Designers Guild* itself, not as laying down any general principle. Actually that is clear from what he said, referring as he did to “the [my emphasis] two works.” After all in that case it was the overall appearance of the two works which led to the inference of overall copying – an inference which the defendants failed to rebut. And the two designs were not just similar overall, one would serve as a substitute for the other. Here the judge has expressly rejected nearly all of the allegations of copying, leaving just a rump of a few ideas which were “derived from or inspired by the copyright work”, albeit implemented in very different ways. And the games, being different from one another, are not competitive in the sense that one would do as a substitute for the other.

The case on a literary work

27. Accordingly I think the appeal in relation to artistic works fails. I turn to that in relation to the literary work. This involves EU law since it is based on the Software Directive of 1991. Pursuant to that Directive as implemented in the UK, copyright can subsist in a computer program and its preparatory design material. It was common ground that the UK legislation must be interpreted in accordance with the Directive, see *Marleasing* [1990] I ECR 4135.
28. The UK Act, drafted with the traditional, but wholly unhelpful way of re-wording a Directive, sets out “a computer program” and “preparatory design work for a computer program” as though they are entirely different types of work in which literary copyright can subsist. What the Directive actually says is: “the term ‘computer programs’ shall include their preparatory design material.” That may not be quite the same thing – the EU legislation appears to contemplate just one copyright in a computer program, not two, one in the preparatory work and the other in the program itself. I do not think anything turns on the difference here. But one can think of cases where it might. Suppose for example different authors for the program and its preparatory material. When does the copyright expire – on different dates depending on the death of the respective author? Or suppose different dealings in the “two” copyrights – is that possible given that the Directive supposes only one copyright? The re-wording, as it nearly always does, throws up room for wholly unnecessary uncertainty and argument.
29. Fortunately nothing turns on the difference of language here. I should, in passing, mention one other difference of language pointed out by Mr Howe. The Directive

defines “restricted acts” as reproduction “in any form, in part or in whole” (Art 4(a)). The UK Act does not say “in part or in whole”. It uses the well-established language “in relation to the work as a whole or any substantial part”, s.16(3)(a). Mr Howe wisely decided that he could not make any point based on this difference of language. He accepted that although the Directive did not say “substantial part” its meaning must be so limited. Otherwise it would require the copying of insubstantial parts to be an infringement – which is so absurd as to be assuredly wrong.

30. With those preliminary observations I can turn to the main arguments. The Judge found against the claimants on two distinct, although related, bases, applicable to both alleged infringements:

[247] [The similarities found to have been derived] are cast at such a level of abstraction and are so general that I am quite unable to conclude that they amount to a substantial part of the computer program. They are ideas which have little to do with the skill and effort expended by the programmer and do not constitute the form of expression of the literary works relied upon.

[248] Further, application of the principles explained by Pumfrey J in *Navitaire* leads to the same conclusion. Nothing has been taken in terms of program code or program architecture. Such similarities that exist in the outputs do not mean that there are any similarities in the software. Further, what has been taken is a combination of a limited number of generalised ideas which are reflected in the output of the program. They do not form a substantial part of the computer program itself. Consideration of Article 1(2) of the Software Directive confirms this position. Ideas and principles which underlie any element of a computer program are not protected by copyright under the Directive.

Mere idea, not expression

31. Mr Howe had to face the formidable objection created by Art. 1.2 of the Directive and recitals 13 and 15. To my mind these provisions are abundantly clear. The well-known dichotomy between an idea and its individual expression is intended to apply and does to copyright in computer software. When I say “well-known” I mean not just known to copyright lawyers of one country but well-known all over the world. Recital 15 refers to the protection of the expression of ideas as being “in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions” and is clearly a reference to this dichotomy. The TRIPS agreement of 1994 likewise recognises this dichotomy, see particularly Art, 9.2.
32. Mr Howe suggested that the dichotomy was intended to apply only to ideas which underlie an element of a program – what he called a “building block”. He cited (as did the Judge) what Lord Hoffmann said about the dichotomy outside the context of computer programs in *Designers Guild*:

[25] My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own: see *Kleeneze Ltd. v. D.R.G. (U.K.) Ltd.* [1984] F.S.R. 399. The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. *Kenrick & Co. v. Lawrence & Co.* (1890) 25 Q.B.D. 99 is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff's work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author's skill and labour as to attract copyright protection.

33. As regards the first proposition I said much the same thing in *Ibcos Computers v. Barclays Mercantile* [1994] FSR 275 at p.291:

The true position is that where an “idea” is sufficiently general, then even if an original work embodies it, the mere taking of that idea will not infringe. But if the “idea” is detailed, then there may be infringement. It is a question of degree. The same applies whether the work is functional or not, and whether visual or literary. In the latter field the taking of a plot (i.e. the “idea”) of a novel or play can certainly infringe if that plot is a substantial part of the copyright work. As Judge Learned Hand said (speaking of the distinction between “idea” and “expression”): “Nobody has ever been able to fix that boundary and nobody ever can, *Nichols v Universal Pictures* (1930) 45 F. (2d) 119”

34. Mr Howe then submitted that the “idea” of the cue pulsing with the power-meter could not be discounted within Lord Hoffmann’s first category because here we are concerned with copyright in a computer program. You cannot say the “idea” has no connection with the nature of the work. Nor did it fall within the second category because it was not held “commonplace,” merely “obvious.” He sought to bolster the argument by reference to the *travaux préparatoires* to the Directive. At the very least, he submitted, the position was unclear and that we should refer some questions to the European Court of Justice pursuant to Art. 234 of the Treaty.

35. I reject all of that. First I think the fact that we are considering a computer program copyright does not in any way preclude a mere “idea” as to what the program should do from being excluded as having nothing to do with the nature of the work. The nature of the work is a computer program having all the necessary coding to function. The general idea is only faintly related to that – no different from the relationship of the general idea of a plastic letter-box draught excluder to the artistic works consisting of the drawings for a particular excluder in the *Kleeneze* case. Indeed I have to say that, as Mr Howe waxed lyrical about the combination of features in the animation, he sounded more like counsel in a patent case than one in a copyright case. Not all of the skill which goes into a copyright work is protected – the obvious example being the skill involved in creating an invention which is then described in a literary work. An idea consisting of a combination of ideas is still just an idea. That is as true for ideas in a computer program as for any other copyright work.
36. Nor am I impressed by Mr Howe’s attempt to limit the dichotomy to “building blocks”. He sought to do this by reference to recital 14 which refers to “logic, algorithms and programming languages” as comprising “ideas and principles.” I see no reason to suppose that Art. 13 is thereby limited. Art 14 is clearly drawn on the basis that the basic position of Art.13 - no protection for ideas and principles - applies also to those specified matters.
37. The same conclusion is reached if one considers TRIPS. Although normally a UK Act is not to be construed by reference to a later international Treaty, I note that Lord Hoffmann considered TRIPS to be of relevance to our domestic copyright law in *Designers Guild* (see [23]). Here the position is much clearer because we are dealing with EU law. The ECJ has held that TRIPS (to which the EU as well as its Member States is a party) is relevant to the construction of earlier EU legislation concerned with intellectual property. In *Schieving-Nijstad v Groeneveld* Case C-89/99 (13th September 2001) the court said:

[30] In the field of trade marks, to which TRIPs is applicable and in respect of which the Community has already legislated, the Court has jurisdiction to interpret Article 50 of TRIPs – as, indeed, it has previously had occasion to do (see *Hermés* [[1998] ECR I-3603], and Joined Cases C-300/98 and C-392-98 *Dior and Others* [2000] ECR I-11307). It is therefore appropriate to recapitulate the principles laid down in that case-law.”

[35] Nevertheless, it is apparent from the Court’s case-law, in a field which TRIPs applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs (see *Hermés*, paragraph 28, and *Dior and Others*, paragraph 47).

38. Mr Howe sought to escape from the fact that we should construe the UK Act in accordance with the Directive which should be construed so far as possible as to conform to TRIPS by a further submission: that TRIPS was only concerned with minimum standards for intellectual property rights and that its signatories were free to provide for greater rights. So, he said, the EU could provide that copyright protection extended to ideas if it so wanted. Now it is in general true that a party to TRIPS can provide more extensive protection than called for TRIPS, see Art.1. But the concluding words of the first sentence of Art.1 add “provided that such protection does not contravene the provisions of this Agreement”. Art. 9.2 positively provides that “copyright protection shall extend to expressions and not to ideas etc. as such”. So in this instance TRIPS lays down a positive rule as to the point beyond which copyright protection may not go. To protect by copyright mere ideas as such would contravene TRIPS. The Software Directive must be construed so as to conform to TRIPS and so must be construed as not to protect ideas as such.
39. As to the *travaux* Mr Howe took us through the following:
- i) the original Commission “Proposal for a Council Directive on the legal protection of computer programs” COM(88) 816 final –SYN 183, submitted on 5th January 1989 (89/C91/05);
 - ii) the amended proposal COM (90) 509 final –SYN 183 (1990/C 320/11), submitted on 18th October 1990; and
 - iii) the Opinion of the Economic and Social Committee.
40. Mr Howe was unable to point to any clear unequivocal statement anywhere suggesting that copyright in computer programs should extend to ideas. Given that state of affairs it would be a waste of time to set out all the material in detail. It is sufficient to record that the submission is based on an argument by implication from unexplained alterations from the original proposal. In particular the original proposal did not use the expression “element of a computer program” in proposed Art.1.2 but merely to “the ideas, principles, logic, algorithms or programming languages.” I cannot extract from this any intention to extend protection to ideas provided they are not “elements.”
41. I am reinforced in my view by the fact that the Economic and Social Committee (whose report is specifically recited in the Directive as being a document to which the Council had regard in making the Directive) clearly did not think the proposal was limited as suggested by Mr Howe. It said tersely:
- “There is no dispute that ‘ideas and principles’ are outside the protection of the law of copyright.”
42. So there is no help for Mr Howe in the *travaux*. I would add generally that *travaux preparatoires*, if not bang on the point, seldom help. If the meaning of the ultimate document is ambiguous, or obscure, then, even if the *travaux* are admissible, there is no point in trawling through them unless they are clear as to what was intended and meant. Constructing arguments around unexplained changes, passages in themselves ambiguous,

or mere possible hints as to what would have been intended if the actual point in issue had actually been addressed, is just a waste of time. I said in *Dyson v Qualtex* [2006] EWCA Civ 166, [2006] RPC 769:

[11] In the context of construing an international treaty by reference to the travaux préparatoires to find a definite legal intention Lord Steyn said: “Only a bull’s-eye counts” (*Effort Shipping v Linden Management* [1988] AC 605 at 625). Much the same goes for trying to ascertain such an intention from a White Paper which precedes legislation.

That is equally applicable to all documents which fall to be construed in the light of admissible *travaux*. There is no point in relying upon *travaux* which are not directly in point – you just substitute the puzzle posed by the actual language to be construed by another puzzle about other language at first or even second remove.

43. So I reject Mr Howe’s “only ideas which are elements are excluded” argument. Actually I do not see, even if it had been right, why the animation cycle should not be regarded as “an element”. After all it is not the game itself. It is an element of the game and so of its computer program. That it is only an element is shown by the fact that it could be transposed to any other snooker/pool computer game as an element of that game.
44. Accordingly I think the appeal on literary copyright fails on the simple ground that what was found to have inspired some aspects of the defendants’ game is just too general to amount to a substantial part of the claimants’ game. The Judge’s evaluation, far from being wrong in principle, was right when he said:

They are ideas which have little to do with the skill and effort expended by the programmer and do not constitute the form of expression of the literary works relied upon.

45. I also think the appeal fails on the more specific basis (also accepted by the Judge) of the principles applied by Pumfrey J in *Navitaire v easyJet* [2004] EWHC 1725 (Ch), [2006] RPC 111.
46. The facts there were stronger than in the present cases, yet the claimants lost. easyJet wanted to substitute its existing airline booking program with another because it had fallen out with Navitaire, the owner of the copyright in the existing program. It commissioned the second defendant to produce a substitute which would look and feel like its predecessor. So far as possible users were not to notice any difference when they used the new program. Without in any way using or even having access to the source code of Navitaire, this was achieved.
47. Pumfrey J held that there was infringement of the artistic copyright in some of the “buttons” of the claimants’ program (see p.131 of the RPC report). But he rejected the main claim. He said:

“125. This does not answer the question with which I am confronted, which is peculiar, I believe, to computer programs. The reason it is a new problem is that two completely different computer programs can produce an identical result: not a result identical at some level of abstraction but identical at any level of abstraction. This is so even if the author of one has no access at all to the other but only to its results. The analogy with a plot is for this reason a poor one. It is a poor one for other reasons as well. To say these programs possess a plot is precisely like saying that the book of instructions for a booking clerk acting manually has a plot: but a book of instructions has no theme, no events, and does not have a narrative flow. Nor does a computer program, particularly one whose behaviour depends upon the history of its inputs in any given transaction. It does not have a plot, merely a series of pre-defined operations intended to achieve the desired result in response to the requests of the customer.

126. The view in favour of Navitaire's case is expressed concisely by the authors of *The Modern Law* in paragraph 34.64 (I have assumed that when they speak of 'obtains...from the original program' they do not mean obtain directly, but indirectly from watching the program work):

For instance, the writing of a financing program may require as part of the task a careful elucidation of the relevant tax regulations—so that they may be reduced to a series of unambiguous statements—and it will be evident to any lawyer that this alone will probably involve a very large amount of work. A competitor might write a program of his own in a different computer language and arranged in a different way and with many improvements of his own but if he obtains the rules for calculating the tax from the original program instead of working these out for himself it is hard to see why he should not be considered a plagiarist.

127. There is a counter-example that throws some light on the nature of the problem. Take the example of a chef who invents a new pudding. After a lot of work he gets a satisfactory result, and thereafter his puddings are always made using his written recipe, undoubtedly a literary work. Along comes a competitor who likes the pudding and resolves to make it himself. Ultimately, after much culinary labour, he succeeds in emulating the earlier result, and he records his recipe. Is the later recipe an infringement of the earlier, as the end result, the plot and purpose of both (the pudding) is the same? I believe the answer is no.

129. The questions in the present case are both a lack of substantiality and the nature of the skill and labour to be protected. Navitaire's computer program invites input in a manner excluded from copyright protection, outputs its results in a form excluded from copyright protection and creates a record of a reservation in the name of a particular passenger on a particular flight. What is left when the interface aspects of the case are disregarded is the business function of carrying out the transaction and creating the record, because none of

the code was read or copied by the defendants. It is right that those responsible for devising OpenRes envisaged this as the end result for their program: but that is not relevant skill and labour. In my judgment, this claim for non-textual copying should fail.

130. I do not come to this conclusion with any regret. If it is the policy of the Software Directive to exclude both computer languages and the underlying ideas of the interfaces from protection, then it should not be possible to circumvent these exclusions by seeking to identify some overall function or functions that it is the sole purpose of the interface to invoke and relying on those instead. As a matter of policy also, it seems to me that to permit the 'business logic' of a program to attract protection through the literary copyright afforded to the program itself is an unjustifiable extension of copyright protection into a field where I am far from satisfied that it is appropriate.”

48. Mr Howe attacked that. I quote his skeleton argument:

“this analogy is a poor one. The reason is that the first chef has deployed two quite distinct types of skill and labour. The first is the skill of devising a recipe, a skill which on no view forms part of the skill and labour protected by copyright in literary works. The second is skill and labour in reducing the recipe he has devised to written form. A copyist who copies from his pudding rather than from his recipe book may appropriate the former skill and labour but none of the latter.

By contrast, a copyist who copies the function of a computer program to write his own program to achieve the same results is clearly appropriating part of the skill and labour expended in designing the program.

49. He further developed the argument basing himself on recital 7 of the Directive. This says “‘computer program’ ... also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage”. He asked us to suppose a case where there are two clear stages in the making of a program – a first stage where the designer sets out all the things he wants the program to be able to do and a second stage (which may be by a different person) where the actual program code is written. Mr Howe contended that the first stage was intended to be protected as such, even if it consisted only of ideas as to what the program should do. Going back to the analogy, the “preparatory work” for the program is like the skill of devising the recipe and the actual program writing like the reduction of the recipe to written form. The difference, he submitted, is that for computer programs, unlike the recipe, the preparatory work is to be protected.

50. I reject the argument. The reason is simple. The Directive does not say that mere ideas by way of preparatory design work are to be protected. As I have said it makes it clear that for computer programs as a whole (which includes their preparatory design work) ideas are not to be protected. What is protected by way of preparatory design work is that work as a literary work – the expression of the design which are to go into the ultimate program, not the ideas themselves.
51. So for example, if Mr Jones had actually written a description of the pulsing, rotating cue, and synchronised power meter his description would (if not too trivial at least) be protected as a literary work. People could not copy that. But they could use the same idea. Similarly and more generally, a written work consisting of a specification of the functions of an intended computer program will attract protection as a literary work. But the functions themselves do not. Of course to someone familiar with the prior English law it is self-evident that copyright could subsist in such a description. The fact that a work can get copyright even if mundane, is old and familiar to an English lawyer. But the Directive needed to say that protection as a literary work should be provided for preparatory design work because not all Member States under their existing laws necessarily provided that. That is the whole point of the Directive – and the clear reason for it is recited in Art. 1.
52. So I think Mr Howe's attack on *Navitaire* fails. The reasoning in *Navitaire* provides a second reason for dismissing this appeal. Pumfrey J was quite right to say that merely making a program which will emulate another but which in no way involves copying the program code or any of the program's graphics is legitimate.
53. Finally Mr Howe suggested the law was sufficiently uncertain as to warrant a reference being made to the European Court of Justice. No less than 6 elaborate draft questions were supplied. I do not think it is necessary to make any reference to resolve this case. It is wholly unrealistic to suppose that the European Court of Justice would hold that copyright protection was to be given to ideas at such a high level of abstraction as those in this case.
54. I would only add this. Both sides submitted that this case had significance for the computer games (and computer program writing) industry. Mr Howe submitted that if the decision below is upheld there is no effective protection for games against copying of the game where a party copies the rules of a game but not its graphics. Mr Carr submitted that that not all things are covered by copyright, that most if not every work is, to some extent, influenced or derived from other works. So it is very important that copyright is not allowed to intervene to stifle the creation of works that are actually very different, as the individual games are here.
55. I agree with Mr Carr. If protection for such general ideas as are relied on here were conferred by the law, copyright would become an instrument of oppression rather than the incentive for creation which it is intended to be. Protection would have moved to cover works merely inspired by others, to ideas themselves.

Lord Justice Lloyd:

56. I agree.

Chancellor of the High Court:

57. I also agree.

APPENDIX – THE LEGISLATION

For “artistic works”

58. So far as is relevant here, s.4(1) of the Copyright, Designs and Patents Act defines artistic works and graphic work as follows:

4.—(1) In this Part "artistic work" means—

(a) a graphic work,, irrespective of artistic quality,

(2) In this Part—

.....

"graphic work" includes—

(a) any painting, drawing, diagram, map, chart or plan, and

(b) any engraving, etching, lithograph, woodcut or similar work;

59. Additionally s. 9(3) provides:

3—In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

And s.178 reads:

“Computer-generated”, in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work.

For “Literary Works”

60. Section 3(1) of the Act (as amended by the Copyright (Computer Programs) Regulations (1992)) provides so far as is relevant:

3(1) In this Part:

“literary work” means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes:

.....

(b) a computer program,

(c) preparatory design material for a computer program

.....

For Infringement

61. Section 16 of the Act provides:

16 The acts restricted by copyright in a work

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom –

(a) to copy the work (see section 17);

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it –

(a) in relation to the work as a whole or any substantial part of it

62. Section 17 expands on the meaning of “to copy”

17 Infringement of copyright by copying

(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.

(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.

The Software Directive 91/250/EEC

63. The 1992 Regulations implement Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs (“the Directive”). It follows (and was not disputed) that these provisions of the Act must be interpreted in accordance with the Directive. I therefore set out its relevant recitals (adding numbers) and provisions:

1. Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

4. Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

5. Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

6. Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply;

7. Whereas, for the purpose of this Directive, the term ‘computer program’ shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

13. Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

14. Whereas, in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages

comprise ideas and principles, those ideas and principles are not protected under this Directive;

15. Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

20. Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Article 1

Object of protection

1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

Article 4

Restricted Acts

Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder;

...

TRIPS

64. Also of importance in the debate are Arts. 1 and 9 of TRIPS (The Agreement on Trade-related Aspects of Intellectual Property Rights which forms Annex 1C to the Agreement establishing the World Trade Organisation signed in Morocco on 15th April 1994 by representatives of the Community and its Member States).

Art. 1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection that is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Art. 9.1 Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.

Art. 9.2 Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.