

Case Update

SAS: No copyright SOS for software developers

The EU's highest court has given an important decision on the scope of copyright protection for computer software. It has decided that copyright protection does not extend to the functionality, programming language and file format of a computer program. It has also confirmed that licensees have rights to use the same ideas as appear in licensed software to develop rival software to do the same thing, provided user manuals and other materials protected by copyright are not themselves copied.

The dispute

The decision is from the Court of Justice of the European Union ("CJEU") in a dispute between software developer SAS Institute ("SAS") and its competitor World Programming Limited ("WPL").

SAS developed computer programs which allowed its customers to carry out statistical analysis of data. A key component of the SAS system was the unique programming language used to write and run applications. WPL felt that there was a market for alternative software capable of executing programs written in the SAS language. Users of the SAS system had to acquire a licence to use SAS components to run their existing programs and to create new ones so users wishing to change software supplier would have to rewrite their existing programs in a different language. WPL therefore developed its own version of the SAS system called the World Programming System.

SAS brought an action against WPL alleging infringement of its copyright in the SAS software and its manuals. SAS claimed that WPL had indirectly copied components of the SAS system by replicating its functionality and infringed the copyright in the SAS manuals.

The High Court in London found that there was no evidence that WPL had any access to the SAS source code, copied any of the text of the code nor copied any of its structural design. It concluded that it was not an infringement of copyright in the source code of software for a competitor to study the code and to write its own program which emulated the functionality. However, it took the view that the case raised issues on which guidance from the CJEU was required.

The decision

The case hinged on the Court's interpretation of the European software copyright directive (Directive 91/250). Article 1(2) of the Directive extends copyright protection to computer programs.

Further information

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The CJEU agreed that neither the functionality of a computer program, the programming language nor the format of data files used to exploit its functions constituted a form of expression protected by copyright under Article 1(2). To the extent that logic, algorithms and programming languages comprised ideas and principles they were not protected either. The object of protection was the source code, object code and preparatory design which would all allow for reproduction or the subsequent recreation of the program. The CJEU said that to accept copyright protection for functionality as such would stifle technological progress and industrial development and allow software developers to monopolise ideas.

In relation to the programming language and format of data files the CJEU stressed that if a third party were to obtain part of the source code and use it to create similar elements in its own computer program that would amount to reproduction of the program. However, WPL did not have access to the source code and just to reproduce the functionality, albeit using the same programming language and data file format, did not infringe copyright.

The Directive contains an exception allowing any licensee of a computer program to observe, study or test the functioning of a computer program to determine the ideas and principles which underlie any element of the program. The CJEU held that in so far as the terms of the licence sought to restrict that exception those terms were void. Accordingly, a copyright owner may not prevent a lawful acquirer of the license from seeking to determine the ideas and principles which underlie the elements of the program when that person does so within the terms of the licence agreement and does nothing to infringe the exclusive rights of the owner. This will still not extend to accessing the source code or using a decompiler to analyse that code.

Finally, the CJEU held that the reproduction in a computer program of a software user manual is capable of constituting an infringement of copyright in the manual if the reproduction constitutes the expression of the intellectual creation of the author of the user manual. Whether WPL has done so in this case will be for the High Court to decide.

Commentary

The CJEU's ruling reinforces the approach of the UK courts in *Navitaire Inc v Easyjet Airline Co* (2004) and *Nova Productions Ltd v Mazooma Games Ltd* (2007) which also held that it was not an infringement of copyright in a computer program for a person, even a competitor, to examine its functionality in order to develop a program which emulates that functionality. The new SAS judgment has generally been welcomed by the IT industry as encouraging progress and development by allowing developers to write complementary and competitive programs. However, some in the industry fear that it encourages software companies to reverse engineer programs without fear of copyright infringement.

Provided licensees are mindful of the terms of the software licence and do not attempt to access or reproduce its source code they will be free to use, study and test the functionality and computer language of a licensed program in order to develop their own emulation. However, in so doing they should take care that they do not reproduce other elements which are themselves separately protected by literary or artistic copyright such as the software manual, source code, preparatory design materials or screen designs.

The dispute will now return to the UK High Court which will have to apply the CJEU decision to the facts of the case.