

Tutorial 10 – Intellectual property and exam prep

1 IBCOS COMPUTERS Ltd v Barclays Mercantile Highland Finance Ltd [1994] FSR 275 Ibcos

This case concerned an issue of copyright violation, alleging that the impugned program was identical to the original program as they were both developed and written by the same developer in spite of an undertaking taken by the developer not to design or sell similar software upon his resignation from the appellant's company.

Justice Jacobs outlined the stages for assessing breach of software copyright:

1. What are the work or works in which the claimant claims copyright?
2. Is each such work "original"?
3. Was there copying from that work?
4. If there was copying, has a "substantial part" of that work been reproduced?

Jacobs J said there was, however, a real risk of making an error if the court adapted well-known principles which had been developed in the context of literary works addressed to humans, and applied them uncritically to literary works whose only purpose was to make a machine operate in a certain manner.

In this case, the interrelationship of the originality of the work (the prerequisite for the subsistence of copyright) and the substantiality of the part of the work copied (the prerequisite for infringement) was of considerable importance.

So far as English law was concerned, the correct approach to substantiality was straightforward. It was the function of copyright to protect the relevant skill and labour expended by the author of the work. It followed that a copyist infringed if he appropriated a part of the work upon which a substantial part of the author's skill and labour had been expended

1. The judge pointed out that in s.3(1) of the Copyright Designs & Patents Act 1988, "*dramatic work*" includes a work of dance or mime. Further, s.3(2) provides that copyright does not subsist in a dramatic work unless and until it is recorded, in writing or otherwise s.3(1), literary work means "any work other than a dramatic or musical work, which is written, spoken or sung" Separately case law provides that a film can be a dramatic work. Discuss whether a computer game can be a dramatic work and, if so, what would be necessary to breach copyright.
2. If the defendants used, but did not copy, the original programmer's design notes, are they guilty of breach of copyright?
3. What is meant by "idea" and "expression" in the judge's statement
4. What evidence could an expert witness provide in a software copyright case?
5. What sort of evidence might convince you of copying from one program to another?
6. A man sells AceCad, 3D modelling software worth £12,000, for £40 on eBay after breaking the software encryption code to make copies. Trading standards officials raided his home and found computer equipment and more than 300 disks containing the software.
 - a. Is this a civil or criminal case?
 - b. Is it a defence to claim that the original software was overpriced?
 - c. Why does this offence matter?
7. To what extent should people be allowed to copy from software (code, look and feel, design ideas, programming techniques)? Justify your answers.

2 Smartwatch scenario

A group of undergraduate software engineers, Team Wilson, have won a hackathon after they created a smartwatch application that supports children in making better eating choices.

A sophisticated algorithm is central to the application, and the group have decided to seek a patent for it. A few friends and family suggest the group should release the smartwatch application as it would benefit a generation of children while they await recognition of the patent. Team Wilson decides to release the application for a fee and to use a software lock to ensure payment.

Team Strachey, another team from the hackathon, has criticised the actions of Team Wilson and stated they are breaking the law and defaming the reputation of the profession. Team Strachey reverse-engineers the smartphone application, rewrites the algorithm, and releases the source code under an open-source software licence. The open-source license stipulates that the source code can be redistributed as long as Team Strachey members are credited. Team Wilson has advised the members of Team Strachey that by reverse-engineering their solution, they have illegally uncovered and shared valuable trade secrets and must stop distributing their source code.

- a) What legal issues might potentially arise in this situation?
- b) Identify an ethical dilemma in this situation and discuss how it may be viewed using a consequentialist and a deontological approach.
- c) What professional ethics issues should each team bear in mind when dealing with this situation, and how could they have acted differently?
- d) What social issues arise for children and parents when using this type of health-related application and also looking for healthy eating advice on social media?