Is a computer language a copyright work?

SAS Institute Inc v World Programming Limited

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Some would say that this High Court Decision of Arnold J handed down on 25 January 2013 amounted to nothing more than recognition of what had been decided in previous UK cases, in merely reinforcing the principle that there is no copyright in the functional aspects of computer programs. Whilst this is correct, the sting in the tail is that there remains uncertainty as to the application of the principle and the precise line in practice between what is functional and what is not and is protectable. On the whole, the decision gives a new level of clarity and certainty on the principle, a positive one from which the software industry overall should benefit. Competition should be encouraged overall, which in turn should be beneficial for the end consumer of these products. Had the decision gone the other way, it might well have had an adverse effect on innovation in the software and computer games industries.

Background

Despite the recent date of this decision, there had been a High Court trial as long ago as June 2010. That trial resulted in one definitive and several other provisional decisions by Arnold J on particular aspects of the case. To finally decide matters, Arnold J felt guidance was required from the CJEU on interpretation of the **Software Directive** (91/250/EEC as codified in 2009/24/EC) and the **Information Society Directive** (2001/29/EC). Accordingly, a reference was made on numerous questions to that court. The CJEU handed down its decision on these on 2 May 2012 (following the Advocate-General's Opinion in the case issued on 29 November 2011). The case finally came back to **Arnold J** for a hearing on 14 and 15 January 2013 for application of the CJEU guidance on the facts of the case as already found by the judge in his trial decision. This decision was issued on 25 January 2013.

So what was this decision all about?

The main point in the case was whether copyright could subsist in the look and feel or functionality of computer programs. The answer in previous decisions had always been no. This would follow from the idea/expression dichotomy, with the expression taking the form of the source and/or object code, as opposed to the functional aspects including the computer language and data files being more akin to ideas or principles underlying the program. What makes the case more interesting is that it opens up a discussion on what precise features exactly might be viewed as falling into each category. In this case, the main feature discussed was the computer

programming language. Could copyright subsist in it? The judge did not finally decide this issue but did provisionally indicate that he did not regard computer language as being capable of qualifying as a copyright work.

Thus, whilst the decision should put to bed all the vexed question of whether copyright can ever exist in aspects of the function of computer programs it does leave the door open to potential arguments that a programming language may be an "intellectual creation", which is protected in the CJEU's, and possibly even the UK's, view of the world. That said, it is likely to be an uphill struggle to succeed in such an argument.

The facts in summary

SAS had developed its SAS software over 35 years as a set of integrated programs, which enabled its customers to carry out a number of data processing and analysis tasks. SAS-licensed customers used the software to write their own applications/programs (which required the use of the SAS programming language). Some of these customer applications were very short and simple but others were complex and had taken substantial time and cost to develop. Effectively, these customers were tied in to the SAS software if their applications were to function. To change to another supplier of software would mean starting from scratch and losing all their existing developed applications and investment.

World Programming Limited (WPL) saw an opportunity to create a rival system. This system imitated the functionality of the SAS system such that its users could run their own application programs originally created via the use of SAS. Therefore, customers could terminate their licences with SAS and move easily to WPL and thus avoid having to recreate all their own relevant applications. Naturally, SAS was not entirely happy and took action against WPL alleging various copyright infringements, including copying the functionality of its system and copying its user manuals. There was no issue that WPL had intended to replicate the function of the SAS' system, but it was also accepted that WPL had not accessed or copied the SAS' source or object code or its text or its structural design. SAS also argued that WPL had breached its licence agreement regarding the SAS Learning Edition, which it had taken out to be able to observe and test the functionality of the SAS system. That licence did not authorise the use of the system to recreate a competing product. In addition, SAS argued that WPL infringed the copyright in its user manuals in using them to design its software and to generate its own equivalent manuals.

The last point was ultimately the only one where SAS had any success in view of some literal copying that had occurred in their user manuals. This finding, however, would be of limited value to SAS as this particular act of copyright infringement could easily be avoided by others and by WPL.

As discussed above, **Arnold J** made initial provisional findings that there was no copyright infringement in regard to the other allegations and referred various questions to the CJEU.

The CJEU's answers

The main findings of the CJEU are summarised below. Neither the functionality of the computer program nor the programming language in or the format of the data files used in a computer program amount to a form of expression of the program and as such are not protected by copyright for the purposes of the **Software Directive**. The CJEU made the point that if the functionality of a computer program were to be protected in this way this would:

> amount to making it possible to monopolise ideas to the detriment of technological progress and industrial development.

This view echoed a previous English case – *Nova Productions Limited v Mazoomba Games* [2007] RPC25 – relating to software for computer games. There **Jacob J** in the Appeal Court stated:

> 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.

Also there was no infringement where WPL observed, studied and tested the behaviour of the SAS program as licensed to it and reproduced its functionality by using the same programming language and the same format of data files.

On the face of it, use of the licence to enable study and testing of the program to establish the ideas underlying it might well have contravened the licence. However, the CJEU noted that **Article 5(3)** of the **Software Directive** created an exclusion for just this scenario as it allows a licensee to do various acts with the program such as load it, display it, etc, to establish its ideas and principles. Also **Article 9(1)** of that Directive provides that any contractual provisions contrary to this will be null and void. The question of infringement, therefore, was easily answered in the negative where it was accepted that there had been no access or use of the source code in question.

The last issue was whether copying of the user manual in a new computer program or in another user manual for it amounted to infringement of copyright in that manual. The CJEU's answer to this was that such acts could be infringement of copyright in the manual, if what was copied or reproduced amounted to taking a substantial part of the expression of the intellectual creation of the author of the original user manual.

SAS' arguments

Counsel for SAS attempted to argue that the SAS language was still capable of being protected in support of its infringement claim. In doing so, he focused subtly on what was a rather confusing and obscure specific CJEU finding that, notwithstanding its decision, the SAS language might still be protected by copyright under the **Information**

Society Directive, if it was its author's "own intellectual creation". Some previous CJEU cases had seemed to suggest that if a work was its author's own intellectual creation that was enough. The SAS argument was that the SAS language was its author's own intellectual creation, even though it was fixed in the form of the components of the SAS system being the SAS software. This meant that the SAS language was protectable under that directive, even if it was not so under the Software Directive.

Arnold J did not accept this argument. Rather he took the line that the CJEU was being "careful" and "consistent" with its previous decision in the case of *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR1-13971). In that case it was held that a graphic user interface (GUI) of a program was capable of being the subject of copyright as its author's own intellectual creation as being part of the expression of the program. It held that the assessment of whether that was in fact the position was to be carried out by the national court taking account of which of its components were "original". However, if those 'original' components of the GUI were differentiated only by their technical function they could not meet this test.

Thus, **Arnold J** held that the CJEU had not excluded the possibility that the SAS language might be protected by copyright in its own right. However, to qualify it would still, as well as being original, have to be non-functional/technical. The CJEU had not, however, answered the specific question regarding the SAS language.

One difficulty for SAS was that it had not pled that the SAS language as such was a distinct copyright work. It had relied instead on the copyright vesting in the SAS components making up the SAS system/program and their outputs and related manuals. The judge refused any amendment to the pleadings on this point, which he held would have been technically necessary to make a decision on it. Also he indicated that to do so he would have needed more explanation of certain distinct factual and legal issues in addition to those already dealt with at the trial. Nonetheless, he went on to consider the issue and gave a provisional view.

In reaching that view **Arnold J** discussed whether on the assumption that a computer language could be a literary work at all, was the SAS language one and thus capable of being the subject of copyright. SAS had provided expert evidence at trial to the effect that it was not a programming language, and at least one element of it was entirely unlike a conventional programming language. WPL's expert of course contradicted this. The judge stressed that to have copyright a work must be fixed or expressed in a medium of some sort. The technical means that enable it to be fixed in such medium was not relevant. So whilst fixation was a condition precedent to copyright existing, that alone was not a quality that would necessarily confer copyright in the work. He went on to make the point that to fully decide this more evidence would have been required on the precise nature of the SAS language, its origins and relationship between it and the SAS system. Nevertheless, based on what had been explored in evidence and his general understanding of the position, his provisional view was that SAS language and programming languages like it could not amount to a copyright work. Rather a language was the tool for creation of the copyright work and set out a system of rules to generate recognised meaningful statements. The language should be kept free for use, as opposed to the ideas it expressed.

On the argument that the SAS language was its intellectual creation and thus it followed that it was a copyright work under the Information Society Directive, the judge's view was that if this logic were more widely applied there would be many intellectual creations that would attract copyright, which clearly should not (for example scientific theories). Underlying this was the proposition that to be protected by copyright a work must be an intellectual creation of its author, fall into one of the designated categories under **section 1(1)** of the **Copyright Designs and Patents Act** and not be excluded from protection per **Article 9(2)** of **TRIPS** and **Article 2** of the **WIPO Copyright Treaty**, i.e. not be an idea, procedure, method of operation or mathematical concept, as such.

This case moves thing on considerably in relation to this complex area, despite it largely being a reinforcement of what was already considered to be the position in principle. That said, it does leave various avenues open for debate in future, which may well be snatched upon by creators in the software industry to try and widen the scope of protection available, which it is already clear copyright provides to their source and object codes. The line between what is functional or a putative idea and what features comprise a fixed and protectable expression of them in the software arena could well remain vague for some time to come. Possibly it will require another case and a reference to the CJEU to clarify this. In the meantime, software developers may wish to consider, and may well be encouraged to seek, patent protection for the functional aspects of their software in cases where it is possible to achieve this.

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