

Ownership,
originality, copying
and infringement of
software copyright
background...



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Abstract

The law provides exclusive rights to the owners of copyright in order to give the owners of copyrighted work the ability to control the use of their work. Copyright protection is automatic and no registration needs to take place, however the only way to enforce such rights is by satisfying a number of different requirements. This often produces difficulty since it cannot always be ascertained who is the owner of a protected work and each case will be decided on its own facts.

Introduction

Software development is often a long process as it consists of the writing of a source code and subsequently converting it into object code. This essentially involves a considerable amount of skill and labour which is why businesses are keen to protect their works. The main form of protection that is available to the owners of such works is the law of copyright, as provided for in the Copyright, Design and Patents Act 1988 (CDPA). This is the area that will be considered when deciding whether FTS's legal team should pursue an action against BMT. Accordingly, the various sections of the CDPA will be reviewed in order to consider whether the work is a protected form of copyright. Hence, it will be considered whether the work is original by distinguishing between an idea and an expression of an idea. Once this has been ascertained it will then be decided whether FTS is actually the author of the work. Provided that the copyright requirements have been satisfied, FTS will then have the onus of proving that Bill has infringed his copyright in the work.

Advice

Section 1 (1) (a) of the CDPA states that “ copyright is a property right which subsists in original literary, dramatic, musical or artistic works.” Accordingly, as it is provided for under section 3 (1) (b) that a literary work includes a computer program FTS will have some form of protection available to them in relation to their product’s code. Nevertheless, it is stated under Article 1 (1) of the Software Directive that “ protection 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.” As such, FTS will need to consider whether the product’s code is an expression or a mere idea. This is likely to prove difficult given the complexity that is often afforded to software programs (Reed and Angel, 2003: 5), yet provided that FTS can satisfy all of the legal requirements associated with the law of copyright protection, then they will most likely be successful in their action.

First of all, FTS must demonstrate ‘ originality’ by showing that the product’s code was created using skill, judgment and individual effort as in *Infopaq International A/S v Danske Dagblades Forening* [2009] EUECJ C-5/08 (16 July 2009). In addition, it must also be shown that the product’s code was in fact recorded, in writing or otherwise (section 3 (2) CDPA). This is likely to cause some problems for FTS, nonetheless, since it was evidenced in the *Navitaire Inc v Easyjet Airline Co & Anor* [2004] EWHC 1725 (Ch) case that where a user interface has been copied but the relevant elements relied upon, such as the source code, are not clearly recorded a lack of protection will exist.

Here, Pumfrey J made obiter comments suggesting that user keyboard
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command codes might not be protected as copyright works because, due to the design of the program, they were not, themselves, recorded in the source code of the program. Consequently, it was made clear by Pumfrey J that “ the program merely contained code which, when executed by the computer, would accept those commands and produce specified results.”

However, in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*, Case C-393/09, 22 December 2010 it was held by the ECJ that the source code and object code of a computer program were forms of expression of the program and that they were therefore entitled to be protected by copyright (Campbell and Cotter, 1998: 140). Therefore, provided that FTS can demonstrate that their product’s code is original then it is likely that protection will ensue. The idea-expression dichotomy that exists in copyright law is reflected in recital 14 of the Software Directive where it is provided that; “ logic, algorithms and programming languages are not protected insofar as they comprise ideas and principles.” Essentially, whilst Pumfrey J in *Navitaire* said that keyboard command codes may not be afforded copyright protection, he also noted that the question of whether computer languages should be excluded from such protection was not “ entirely clear” and that the ECJ should therefore provide guidance on this matter.

In July 2010, this issue of was in fact revisited in *SAS Institute v World Programming Ltd* [2010] EWHC 1829 (Ch) when the High Court had to decide how Article 1 (2) of the Software Directive should be construed. Arnold J agreed with Pumfrey J’s view in *Navitaire* that Article 1 (2) should be

interpreted as meaning that copyright in computer programs did not protect <https://assignbuster.com/ownership-originality-copying-and-infringement-of-software-copyright-background/>

the following from being copied; programming languages, interfaces and the functionality of a computer program (Morton, 2013: 143). However, Arnold J stated that because of the uncertainty surrounding software programs a referral to the ECJ was required. On being referred by the High Court, the ECJ held that the copyright available to computer programs under the Software Directive does not protect the functionality of a computer program, its programming language or the format of data files used in it. In January 2013, the High Court applied the ECJ's ruling, yet the High Court's decision was upheld by the Court of Appeal in November 2013.

In accordance with this it is likely to prove very difficult for FTS to establish a claim in copyright and even if this can be ascertained, they will still have to demonstrate additional copyright requirements, such as ownership.

Accordingly, software cases also give rise to ownership issues since there will often be more than one author due to the complexity and size of computer codes generally. Nevertheless, section 9 (1) CDPA makes it clear that the owner of a work is the person that has created it. As this is a computer-generated work, it will thus be the person who arranged for the creation of the work (section 9 (3)) unless he has created the work within the course of employment. If it is found that Bill created the work, FTS will still be the owner as the ownership of copyright remains vested in an employer if the creation was made during the course of employment (section 11 CDPA). Nevertheless, as evidenced in (1) Laurence John Wrenn (2) Integrated Multi-Media Solutions v Stephen Landamore [2007] EWHC 1833 (Ch) each case will be decided on its own facts. Here, it was held by the court that since there

was a written agreement between the parties, an exclusive license could be implied.

Regardless of these difficulties, however, software can still be afforded copyright protection and the most common act of infringement that occurs in relation to source or object codes is unauthorised copying. Here, a distinction needs to be made between literal and non-literal copying. Literal copying occurs when an identical copy is made, whereas non-literal copying occurs when the structure, appearance or manner of the code has been copied (Pila, 2010: 229). In the case of literal copying, it will generally be easier to establish a claim of copyright since it will merely have to be shown that a substantial part of the code has been copied, which will be based upon the skill, labour and judgment that has been expended; *Cantor Fitzgerald International and Another v Tradition (UK) Limited and Other* [2000] RPC 95. In the event that there has been a non-literal copying of the works, it will be a lot more complex to establish. This is because it is often the case that two completely different programs will produce the same results. Therefore, although it might appear on the face of it that the program has been copied; this may not actually be the case.

InThrustcode Ltd v WW Computing Ltd [1983] FSR 502 it was noted by the Court that; “ the results produced by operating the program must not be confused with the program in which copyright is claimed.” Another consideration FTS will need to think about is if the codes were originally created by a third party. This is because if a third party has been commissioned to create the copyrighted work, ownership of that work will remain vested in the third party unless there has been an express
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agreement to the contrary (Lyons, 2005: 3). If no such agreement has been made, the court may imply an assignment or licence so that FTS can use the software, although the scope of an assignment or licence will depend entirely upon the facts of the case. In *Robin Ray v Classic FM Plc* [1998] FSR 622 it was held by the Court that both parties had accepted the law in relation to the implication of terms as to ownership and the licensing of copyright. Arguably, it is evident that whilst FTS may have a claim against Bill for copyright infringement, it will be very difficult to prove because of the complex nature of software copyright.

Conclusion

Overall, given the long process that is involved with software development, it is likely that FTS's legal advisers will have to overcome a number of obstacles before they can establish a claim in copyright. Consequently, they will first need to establish that they are the author of the product's code and that it was an original creation. Once this has been ascertained they will then need to show that their product has actually been infringed by Bill, which may prove extremely difficult given the complexity of software programs.

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(1) Laurence John Wrenn (2) Integrated Multi-Media Solutions v Stephen Landamore [2007] EWHC 1833 (Ch)

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