

UK High Court Re-iterates Limitations upon Extent of Copyright in Software

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Navitaire Inc v (1) Easyjet Airline Company and (2) Bulletproof Technologies Inc²

This case, the judgement in which has recently been published, re-emphasises some important limitations on the scope of copyright protection as it applies to computer software. In particular, the reluctance of the UK Courts to protect the 'look and feel' of a computer program has been highlighted.

The facts

Easyjet Airline Company (Easyjet) had previously enjoyed a licence from Navitaire Inc (Navitaire) in respect of their airline booking system, OpenRes. In conjunction with that, Easyjet also had a licence in respect of a web interface to OpenRes called TakeFlight. Subsequently, Easyjet developed an alternative system which it called eRes.

It was not disputed that Easyjet wanted a program which was substantially indistinguishable from the OpenRes system. It was also not disputed that none of the underlying software or code in any way resembled that of OpenRes. However, the eRes system did act upon identical or near identical inputs to that of OpenRes and produced very similar results or outputs. Navitaire claimed that the copyright in its OpenRes system had been infringed by what they called 'non textual copying' ie without any direct copying of the underlying code but simply by a detailed analysis of and reproduction of the operation of the program.

The judgement

The judgement is lengthy, running to some 111 pages. Navitaire did succeed

in some less important respects. The Court held that:

- sufficient skill and labour had gone into the creation of certain screen icons to enable them to attract copyright and that copyright had been infringed because the icons had been copied exactly by Easyjet;
- certain of the computer screens produced by the OpenRes system qualified as artistic works and had been copied in such a way as to constitute an infringement of Navitaire's copyright; and
- Easyjet had made some illicit copies of OpenRes at various stages during the process of migrating data to the new system.

However, in the most important respects, Navitaire's claim failed. Crucially, the Court said that there was no protection for the 'business logic' (what might otherwise be described as the underlying business purpose) behind the OpenRes program stating:

"As a matter of policy, to permit the 'business logic' of a program

to attract protection through the literary copyright afforded to the program itself was an unjustifiable extension of copyright protection".

The Court refused to draw the analogy with the plot of a book, which, in certain limited circumstances, has previously been held to attract protection. Because none of the program code had been copied, the Court refused to say that the business function of creating a reservation for a particular passenger on a particular flight was, of itself, capable of being the subject of copyright protection.

The Court also held that:

- screen displays, which the Court described as 'providing the static framework for the display of the dynamic data...', were capable of amounting to literary works but that the acts complained of did not amount to copyright infringement at law;
- copyright did not subsist in individual words or letters making up commands recognised by the program either individually or as a compilation; and

Australian Position

It is likely that an Australian court would have reached a similar conclusion that copyright does not protect the "look and feel" of a computer program.

In Australia, as in the UK, copyright only protects the expression of an idea and not the idea itself. This is often a difficult distinction to make.

The scope of copyright protection for computer programs has been the subject of much debate in Australia. Australian courts have generally been hesitant to broaden the scope of copyright protection to the "look and feel" of a program. In *Autodesk Inc v Dyason (No 2)*, the Australian High Court confirmed that "functionality is not the proper object of protection... the purposes or function of a utilitarian work is its idea, while the method of arriving at that purpose or function is the expression of the idea".³ In 1995, the Copyright Law Review Committee decided against recommending the extension of copyright to protect the "look and feel" of a computer program.⁴

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- copyright does not subsist in computer languages by themselves but does subsist in the expression of a program written in a particular language.

The consequences

This case highlights the limitations of copyright protection in the UK, particularly in cases where there has not been direct copying of computer code but simply access to the operation of a program. The decision

has not fundamentally changed the law but the Court has declined the opportunity to extend the line of isolated cases which had begun to recognise the possibility of protection for the look and feel of programs, generally in the context of ex-employees who have gone off to develop a program in competition with their ex employer. This is in contrast with US copyright law which has tended to offer much greater protection to the look and feel of programs. The judgement will need to

be analysed carefully by any company which seeks to develop a product which mimics the operation of another.

- 1 Paul Golding may be contacted at p.golding@TRGlaw.com
- 2 [2004] EWHC 1725 (Ch).
- 3 (1993) 111 ALR 385 at page 388.
- 4 Copyright Law Review Committee, *Report on Computer Software Protection*, 1995.

Telephonic Communicators International v Motor Solutions Australia*

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This case is a warning to anyone who is developing valuable intellectual property to make sure that it has sorted out the ownership and protection of it. In this case, Telephonic Communicators International Pty Limited ("TCI") failed in an attempt to prevent a company which had developed software for it to give that software to a competitor.

Background

TCI was a developer of various hardware and software products used for training those who sell motor vehicles, and this included certain hardware and software for recording telephone calls (for teaching sales persons good telephone skills). TCI's owners did not themselves have the required computer skills, but had the knowledge and expertise required in respect of sales-training techniques, so they engaged one of the respondents, Scribe, to develop the necessary software and hardware in 1996. TCI instructed Scribe in precisely what was required, and Scribe wrote the code. The arrangements between the parties were never clearly documented – certainly, there was no assignment in writing of copyright as required by s. 196(3) of the *Copyright Act 1968* in respect of any assignment of copyright.

In June 2002, TCI learnt that Scribe had agreed to supply one of the products developed by Scribe for TCI,

E-call24.com, to another company, Motor Solutions Australia Pty Limited ("MSA"). To avoid the effect of the ensuing legal proceedings in the Supreme Court, the owner of Scribe, Mr Murray, formed another company, Logea, and said that he had "rewritten" the E-call24.com software in order to create a new product (called "Phone Wizard") which did exactly the same thing, and which Logea duly supplied to MSA. The legal proceedings in the Supreme Court were resolved by a settlement deed dated 15 January 2003 which, although very oddly worded, made it clear that TCI became the owner of the copyright in the E-call24.com software.

The question before the Court was whether the making and selling of the Phone Wizard product after 15 January 2003 was an infringement of the copyright belonging to TCI in E-call24.com. There was a question regarding the ownership of the copyright before that date, but the absence of any assignment in writing and the inability on the part of TCI to prove any agreement to bring an assignment into existence (Mr Murray would apparently have been prepared to sign it, had it been created) made this an impossible proposition.

Decision of the Federal Court

The difficulty facing the Court was one of evidence. The software of each

of Phone Wizard and E-call24.com was written by Mr Murray using a software development tool called "Delphi", which produced Pascal code. To prove that Phone Wizard infringed the copyright in E-call24.com, TCI had to establish that the Phone Wizard software took a "substantial part" of the E-call24.com software.

The code of each of the products appeared to be different, yet each product did substantially the same thing in the same way. Infringement of copyright in computer software need not be proved by "literal" copying – that is word-for-word identity – but may be established by the taking of the sequence and logic of the code of the original, in the same way that the copyright in a play or a screenplay for a film may be infringed by another play or film which takes the same characters and sequence of events but uses different words.¹ On the other hand, merely adopting the "ideas" behind a work, and then creating your own, is not an infringement of copyright.

Whilst there was no doubt that Mr Murray had access to the E-call24.com source code, the question was whether he copied, even subconsciously, a substantial part of E-call24.com in creating Phone Wizard.