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Good News, Bad News. The *SAS Institute v. World Programming* case and its effect on software copyright law

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Sometimes, it's not what happens that's important, but what happens next. A case in the English High Court has confirmed what the software industry has known for some time: that it is not copyright infringement in the UK merely to copy the functionality of a computer program. But the real implications of the case will not become clear for some time and, when they do, they may be significant for the software industry. Even while giving its judgment, the English High Court has referred to the European Court of Justice several fundamental questions about the extent of copyright protection for software. When it eventually comes, the ECJ's decision could significantly change the way in which software companies produce and protect their products, and market their software right across the European market.

In *SAS Institute, Inc. v. World Programming Limited*, the English High Court was asked to consider whether software and manuals created by World Programming ("**WPL**") infringed SAS Institute's ("**SAS**") copyright in its analytical software and manuals. The case concerned the "non-literal" copying of SAS's software that occurred when WPL created a similar program that was designed to generate responses identical to those delivered by SAS's software.

The court's preliminary finding was that WPL did not infringe SAS's copyright in its analytical software. So far, so good. The judgment is consistent with previous UK decisions holding that it is not copyright infringement merely to copy the functionality of another computer program. But the long-term implications of the case arise because the court was of the opinion that SAS's claims raised a number of important issues on the interpretation of the EU Software Directive and the Information Society Directive. Accordingly, the court has referred a number of questions on the scope of copyright protection for computer programs to the European Court of Justice (the "**ECJ**"). Those questions raise important and complicated questions of the nature of copyright protection for computer programs, programming languages, and interfaces.

SAS'S CLAIMS OF COPYRIGHT INFRINGEMENT

SAS has developed a proprietary analytical software system (the "**SAS System**") which comprises an integrated set of programs or components enabling users to carry out a range of data processing tasks and analyses. Users can use the core component of the SAS System (**"Base SAS"**) to write and run applications to manipulate data. The functionality of the Base SAS can be extended by the use of additional components (*e.g.*, SAS/ACCESS, SAS/GRAPH and SAS/STAT (the **"SAS Components"**)). Applications are written in a language known as the SAS Language. Over the years, a large number of applications have been written in the SAS Language.

WPL believed that there was a market for a software system that would be able to execute programs in the SAS Language and created a program called World Programming System (**"WPS"**) to do so. WPS was created with the intention of emulating as much of the functionality of the SAS Components as closely as possible so that the same inputs

would produce the same outputs. WPL did not have access to the source code of the SAS Components and did not attempt to decompile or reverse engineer the object code in the SAS System or the SAS Components. When writing WPS, WPL's programmers had access to: (a) the responses produced by the SAS Learning Edition and the SAS Full Edition; and (b) the SAS Manuals. WPL also obtained information on the SAS System from a number of other sources including customer feedback and knowledge of statistics and other applications.

SAS alleged that WPL had:

- copied the SAS Manuals when creating WPS and as a result infringed its copyright in the SAS Components;
- indirectly copied the programs comprising the SAS Components and as a result infringed its copyright in the SAS Components when copying the SAS Manuals;
- used a version of the SAS System (the SAS Learning Edition) in breach of the terms of its licences; and
- infringed its copyright in the SAS Manuals when creating its own documentation and a quick reference guide.

COPYRIGHT PROTECTION FOR COMPUTER PROGRAMS

Various international treaties and pieces of European legislation provide that computer programs are to be protected by copyright as literary works (*e.g.*, Article 10(1) of the Agreement on Trade Related Aspects of Intellectual Property Rights ("**TRIPS**"), Article 4 of the WIPO Copyright Treaty and Article 1(1) of the EU Software Directive). In addition, however, it is a fundamental principle of copyright law that ideas, procedures, methods of operation or mathematical concepts as such are not protected (*e.g.*, Article 9(2) of TRIPS and Article 2 of the WIPO Copyright Treaty). The EU Software Directive specifically provides that copyright protection applies to the "expression in any form of a computer program" but the "ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright" (Article 1(2) of the EU Software Directive).

The English courts have an obligation to interpret the EU Software Directive and national law in conformity with TRIPS and the WIPO Copyright Treaty.

THE HIGH COURT'S FINDINGS

There was no dispute between the parties that each of the SAS Components is an original computer program in which copyright subsists and that each of the SAS Manuals is an original literary work in which copyright subsists.

Previous decisions of the English courts have held that copyright in computer programs does not extend to (i) programming languages; (ii) interfaces; or (iii) the functionality of a computer program (*Navitaire Inc v easyJet Airline Company* and *Nova Productions Limited v Mazooma Games Limited*).

The court was of the view that SAS's claims raised fundamental issues of copyright law, namely: (1) the extent to which copyright protects ideas, procedures, methods of operation and mathematical concepts as distinct from expressions of those ideas, procedures, methods of operation and mathematical concepts; (2) the extent to which copyright protects the functionality and interfaces of computer programs and the programming languages in which they are expressed; and (3) the test to be applied to determine what amounts to a reproduction of a substantial part.

Following a detailed review of the legislative history behind the EU Software Directive, the EU Information Society Directive and previous decisions of the High Court in *Navitaire Inc v easyJet Airline Company* and the Court of Appeal in

Nova Productions Limited v Mazooma Games Limited, the court:

- was of the preliminary view (following *Navitaire v easyJet*) that programming languages were not protected by copyright under the EU Software Directive because the distinction between a computer program and its language is consistent with the distinction between expressions and ideas, procedures, methods of operation and mathematical formula. In reaching this view, the court accepted that there is room for debate on how broadly the concept of a programming language should be interpreted;
- was of the preliminary view (again, following *Navitaire v easyJet*) that interfaces are not protected by copyright under the EU Software Directive;
- was of the preliminary view (following *Navitaire v easyJet* and *Nova v Mazooma*) that it is not, without more, an infringement of copyright in a computer program to create a new computer program with the same functionality;
- concluded that it is not an infringement of the copyright in a manual describing the functions of a computer program to use the manual as a specification of the functions that are to be replicated and, to that extent, to reproduce the manual in the source code of the new program;
- held that the uses by WPL of the SAS Learning Edition were outside of the scope of the licence granted by SAS, however, the terms of the SAS Learning Edition were null and void to the extent that a user infringes SAS's rights when observing, studying and testing the SAS Learning Edition in order to determine the principles and ideas which underlie any element of the program (act which may be permitted by Article 5(3) of the EU Software Directive);
- held that WPL had substantially reproduced the language of the SAS Manuals in its manuals and thereby infringed SAS's copyright in the SAS Manuals.

With respect to all questions other than whether WPL had infringed SAS's copyright in the SAS Manuals, the court had doubts as to whether its conclusions that that WPL had not infringed SAS's copyright in the SAS Components correctly applied the EU Software Directive and the Information Society Directive. These doubts explain why the court felt that a reference to the ECJ is required to resolve the issues raised by the case. Although the exact wording of the questions has yet to be agreed, the questions to be referred to the ECJ are likely to concern the nature and scope of copyright protection for software and the extent of certain exclusions from protection.

CONCLUSION

Although software developers can take comfort from the fact that, in reaching its preliminary conclusion that WPL did not infringe SAS's copyright in the SAS Components, the court has not departed from previous English decisions dealing with this point, the reference to the ECJ will provide much needed clarity on important aspects of the EU Software Directive and the Information Society Directive which deal with the extent to which computer software is eligible for copyright protection. If the ECJ agrees with the court's interpretation by finding that only a limited portion of computer software is eligible for copyright protection, the decision could result in greater competition in the software industry. However, it could also pose significant risks to the market shares of, and fees charged by, established software providers by opening the door for competitors to launch competing products emulating the functionality of existing software products.

The potential lifeline for software companies is that the court accepted that copyright protection: (a) is not limited to the text of the source code of a computer program; and (b) extends to protecting the design of the computer program (*i.e.* its structure, sequence and organization) but that there is there is a distinction between protecting the design of a computer program and protecting its functionality. The key question in determining whether a computer program is entitled to copyright protection is the nature of the skill, judgement and labour involved and copyright in a computer program protects

the skill, judgement and labour in devising the form of expression of the computer program, *i.e.*, its design and source code.

Even if the ECJ agrees with the interpretation adopted by the court, it should be noted that the current approach of the English courts does not give to *carte blanche* to software developers to copy the functionality or "look and feel" of a computer program because copyright protection for other forms of works may restrict what competitors can do to launch a competing product (*e.g.* the High Court in *Nova v Mazooma* held that certain files which created visual effects for the user were graphic works and were protected as artistic works).

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