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In Focus

- Computer program - No copyright protection to functionality and language
- China overhauls its Patent Law
- Delay in filing evidence in opposition proceedings - Registrar of Trademarks does not have power to condone delay beyond one month
- Copyrights – Communication of literary or musical works embodied in sound recording
- Patents – Scope of amendments to specification

JUNE 2012

Contents

Article

Computer program - No copyright protection to functionality and language

3

News Nuggets

5

Ratio decidendi

6

Article

Computer program - No copyright protection to functionality and language

By Subhash Bhutoria

In a recent decision by the European Union's Court of Justice (CJEU) the Court has opined that the functionality and language of a computer program do not enjoy copyright protection under the EU directives. This article aims to highlight the EU Court's interpretation of the EU directives and further analyze the case on hand.

The matter *SAS Institute Inc. ('SAS') v World Programming Ltd. ('WPL')*¹ was referred to the CJEU by the High Court of Justice of England and Wales (Chancery Division) for a preliminary ruling concerning the interpretation of Articles 1(2)² and 5(3)³ of the Council Directive 91/250/EEC and Article 2(a) of the Council Directive 2001/29/EC.

Briefly, the facts of the case are as follows. SAS is the owner of a leading statistical analysis program, whose core component 'BASE SAS' enables users to write and run their own application programs ('scripts') in order to adapt the SAS system to work with their data. WPL independently developed a competing program aimed at enabling the customers to run their aforesaid scripts on WPL's program. Admittedly, WPL studied the SAS manuals and tested the operations of a licensed SAS program to understand the methods of the said SAS program. However, WPL had no access to the source code of the said SAS program and developed its competing program on the basis of study, observation and

testing of SAS program.

SAS preferred law suit before the High Court of Justice of England and Wales, seeking to prevent WPL from providing customers an alternative to the SAS program. SAS claimed *inter alia* that WPL copied its manuals while developing its impugned program and thereby indirectly copied the SAS program.

Arnold J. of the Chancery Division held that WPL has not infringed the copyright of SAS on the basis that the parties' respective programs are substantially similar only in regard to their functional behavior and programming language, which is not protected under the Directive. However, Arnold J. referred the matter to the European Court of Justice seeking interpretation of the Directives in respect of, *inter alia*, the following questions:

- a) Whether under Article 1(2) of the Council Directive 91/250/EEC, creating a program without access to object code or de-compilation of the object code of the first program amounts to infringement?
- b) Whether under Article 5(3) of the Council Directive 91/250/EEC, licensee is entitled, without the authorization of the right holder, to perform acts of loading, running and storing the program in order to observe, test or study the functioning of the first program so as to determine the ideas and principles which underlie any element of the program?

¹ *SAS Institute Inc v World Programming Ltd*, C-406/10, ECJ Cases, European Union Court of Justice.

² **Article 1 of Council Directive 91/250/EEC of 14 May 1991 - Object of protection**

1....

2. Protection in accordance with this Directive 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.

³ **Article 5 of Council Directive 91/250/EEC of 14 May 1991- Exceptions to the restricted acts**

1...

2...

3. The person having a right to use a copy of a computer program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

In response to the first question, the Court observed that Article 1(2) of the Council Directive 91/250/EEC extends protection to expression in any form i.e. source code or object code, of a computer program. However, the ideas and principles which underlie any element of a computer program, including its interface, are not protected. The Court opined that interface does not enable reproduction of the computer program, but merely constitutes an element by means of which the users can use the features of the computer program. The Court referred to Article 2 of WIPO Copyright Treaty and Article 9(2) of TRIPS, both of which extends copyright protection to expression and not to ideas, procedure, methods of operation or mathematical concepts as such.

The Court opined that only when a third party procures part of a source code, object code relating to the programming language or to the format of the data files, and creates similar elements in its computer program, with the aid of such part, that conduct would amount to reproduction for the purpose of infringement. Further the Court opined that only when the third party has decompiled a computer program and has used the information for development, production or marketing of a substantially similar computer program, that conduct would amount to infringement. The Court noted that WPL neither had access to the source code nor did it decompile SAS's computer program and hence is not liable for infringement under Article 1(2) of the Council Directive 91/250/EEC.

In response to the second question, the Court opined that Article 5(3) of the Council Directive is consistent with Article 1(2) of the Council Directive and ensures that only expression is protected under the Directive and not the ideas or principles. If the licensee has determined the underlying ideas and principle in any element of the computer program within the framework of the license, the licensee will not be liable for any infringement.

⁴ 982 F.2d 693

⁵ 49 F.3d 807

Analysis

The instant case envisages an important aspect of copyright protection in computer program i.e. interoperability. It is apparent that in consonance with the legislative intent of providing appropriate protection to the copyright owner and rewarding the owner for its skill, labour and investment on one hand and encouraging innovation and competition on the other, the Court has taken a pro-competition and pro-interoperability approach in deciding the matter. It is noted that the observation of the learned Judge is also in consonance with the precedents as laid down in the US cases *Computer Associates International Inc. v. Altai Inc.*⁴ (case pertaining to non-literal copying of computer program) and *Lotus Development Corp. v. Borland International Inc.*⁵ (case pertaining to the interface in computer program) where the Hon'ble Courts have dismissed the claims of copyright infringement on the ground that functionality and method of operation are not protected under copyright laws. It is not incorrect to suggest that the law regarding protectable subject matter of a computer program is harmonized globally.

The case is also important from the perspective of whether Graphical User Interface (GUI) can get copyright protection. In the Court's opinion, an interface is a medium between the user and computer which enables communication but not reproduction of the computer program. Therefore, it does not qualify for copyright protection. However, it is possible that a GUI may qualify as an 'artistic work' and hence a protectable subject matter under the copyright laws. This aspect of copyright protection has not been settled by the findings of the Court in the instant case.

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NEWS NUGGETS

China overhauls its Patent Law

In a recent move, China allowed its drug makers to produce generic versions of the medicines which are still under patent protection, during emergencies, unusual circumstances or in public interest. The amended patent law allows China to issue compulsory licenses to those companies who are willing to produce generic copies of the medicines. This amendment came into effect from May 1, 2012. The drug makers have also been provided with an opportunity to export those generic copies to other countries in view of public health. China's decision comes within months of a similar move by India's recent grant of compulsory license to anti-cancer drug 'Nexavar'.

While China by proposing compulsory licensing and Argentina through new guidelines to determine patentability tightened the IP laws relating to medicines, America is exploring a novel suggestion to balance IP rights and price of medicines. The Sanders Bill seeks to establish a prize system for development of medicines to fight AIDS. The bill proposes establishment of a prize fund to award prizes every fiscal year for medical innovation relating to a qualifying treatment for HIV/AIDS, or a new manufacturing process for such qualifying treatment for HIV/AIDS. One of the findings relied upon by the bill is that market exclusivity and other IP rights for new drugs is an unfair mechanism to reward investments.

Sporting Olympic marks

The IP battle in sports is swifter, higher and

stronger. Last month the use of colour of a car as 'Olympic White' was held to be a violation of trademark of the Olympic Organising committee by the Ninth Commercial Court of Appeals, Russia. Earlier, the Federal Antimonopoly Service had ruled that 'Olympic' is a protected verbal component of Sochi-2014 (Winter Olympics) Organizing Committee's trademark registered for several goods, including motor vehicles and the Moscow Commercial Court had ruled against an auto major which was not authorised to use Olympic symbols to advertise cars. Britain, playing host to the 2012 Olympics is witnessing a proliferation of Olympic titles and logo. It is reported that from hairdressers to internet cafes, numerous local business could become liable for infringement of IP rights as enforced by the London Organising Committee.

A geographical name as a trademark

A UN World Heritage Site - St Kilda in Scotland long uninhabited, recognised for its natural beauty and cultural heritage is also in news for its trademark battle. The Western Isles Council has registered St Kilda as trademark to be used in a variety of merchandise, events and services. The National Trust for Scotland to whom the island was gifted claims that it has rights, though unregistered, to the trademark. However, the Office of Harmonisation for the Internal Market (OHIM) turned down this claim and the Trust plans to appeal to the General Court of the European Union.

RATIO DECIDENDI

Copyrights – Communication of literary or musical works embodied in sound recording

Communication of a sound recording to the public by its owner does not encroach upon the right of the owner of the underlying literary and musical works to perform said works in public. Delhi High Court in its recent judgment, in a dispute as to whether a separate license in respect of literary and musical works embodied in the sound recording can be asserted by the owner of copyright in such works in addition to the license secured from the copyright holder in the sound recording, has held that had the intention of Indian legislature been that the owner of a sound recording (derivative work) should not communicate the sound recording to the public without obtaining prior authorization of the owner of the copyright in literary and musical works (original works) or that two permissions had to be obtained, it would have specifically expressed such intention in the Copyright Act, 1957, as in the case of UK's legislation. The petitioner had argued that once the owners of the lyrics and the musical scores exploit their right to permit a sound recording, it would not mean that their works have become a sub-set of the sound recording and that the creation of a sound recording i.e. a derivative copyrightable work does not affect the right in the underlying (lyric and musical score) works. The Court, however, dismissed the appeals and upheld the single judge order [*Indian Performing Right Society Ltd. v. Aditya Pandey*—Delhi High Court judgment dated 8-5-2012 in FAO (OS) No. 423-425/2011].

Trademark – Word “Ayur” is generic and cannot be registered

“AYU” and “AYUR” are words belonging to the public domain and no one can appropriate it exclusively. The Intellectual Property Appellate Board in its recent order has held that the trademark “Ayur” is plainly unregis-

trable even if it is used for 100 years. The Board while holding so observed that the fact that the respondent was involved in so many litigation while protecting said mark, clearly show that everyone is of the impression that the words “AYUR” and “Ayush” are in the public domain available for adoption in conjunction with some other word which will make their mark distinguishable or registrable. It was also noted that respondent cannot claim the mark to be an invented word, as its own company profile stated that ‘Ayur’ means life. The mark was further held as deceptive inasmuch as the respondent claimed that it was used for non-ayurvedic products. The Board held that the said mark can never acquire distinctiveness and was likely to cause confusion and deception and it did not pass tests of Sections 9 and 11 of the Trademarks Act, 1999 and would harm public interest if it remained in the register [*Hindustan Unilever Ltd. v. Three-N-Products*—IPAB Order No. 117/2012, dated 18-5-2012].

Patents – Scope of amendments to specification

Words “consisting of” cannot be changed with words “comprising of”. The Intellectual Property Appellate Board (IPAB) has rejected amendment to the patent specification, seeking substitution of the words ‘consisting of’ by words ‘comprising of’. The Board relied on precedents wherein it had been held that “comprising” leaves the claim open for the inclusion of unspecified ingredients even in major amounts while “consisting of” closes the claim to the exclusion of materials other than those recited except for impurities originally associated. The Board noted that initially the inventor had thought of only two elements for the said product and that the amendment sought would expand the scope of the invention. The Board, however, allowed change of the word ‘roller’ to ‘pad’ holding it

to be a translation error [*Magotteaux International S.A. (Belgium) v. Assistant Controller of Patents & Designs* – IPAB Order No. 139/2012, dated 1-6-2012].

Delay in filing evidence in opposition proceedings – Registrar of Trademarks does not have power to condone delay beyond one month

The Intellectual Property Appellate Board (IPAB) has held that the Registrar of Trade Marks does not have power to condone delay of more than one month in filing evidence in support of opposition and take on record such evidence. Rule 50 of the Trade Mark Rules, 2002 will apply in respect of time limit for filing of evidence and the Registrar does not have the power to extend it beyond ‘*such further period not exceeding one month*’. In the instant case the appellant had sought extension of time by one month but filed evidence along with application for condonation of delay after 20 days from expiry of condonable period of one month. The Registrar however passed an order treating the opposition as abandoned and also dismissed the review petition. The appellant argued that the Registrar was empowered to grant extension of time/condonation of delay under Section 131 of the Trade Marks Act, 1999 and that Rule 105 Trade Marks Rules, 2002 which does not contain time limit for extension, applied to applications made

in Form TM-56 [*H.I. Tamboli & Co. v. Urmin Products Pvt. Ltd.*, IPAB order dated 18-5-2012].

Trademark ‘Ananda’ is in public domain

The Delhi High Court declined to grant interim injunction in relation to the trademark ‘Ananda’. The Court, while upholding the single judge order and while relying upon an earlier order in the case of *Bhole Baba Milk Food Industries*, has held that the mark was not only *public juris* but is also closely associated by large mass of people in India as indicative of, in relation to an abode. It was also held that sales of Rs. 200 crores spread over 10 years would prima facie be insufficient evidence to establish that the said word, in relation to an abode, has acquired such secondary meaning that an ordinary consumer would automatically conclude that every abode was that of appellant i.e. is indicative of any distinctiveness. The appellant was having the registered service mark and trade mark and using said mark for his spas and ayurvedic and herbal preparations, toiletries, bread, biscuits and cakes and the grievance pertained to the respondent marketing his apartments under the name ‘Bestech Park View Ananda’ [*IHHR Hospitality Pvt. Ltd. v. Bestech India Pvt. Ltd.* – Delhi High Court dated 9-5-2012 in FAO(OS) 352/2011].

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