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

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[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.

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?

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.

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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[4] 982 F.2d 693
[5] 49 F.3d 807