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Copyright v Contract

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Abstract

In light of recent decisions such as *Navitaire v Easyjet*[1] and *Nova Productions v Mazooma Games*[2], the boundaries between protected expression and unprotected ideas and therefore the extent of copyright protection for computer programs has been more clearly defined. These cases reinforce the view that software houses may find it difficult to succeed in a copyright action against another for writing a computer program which emulates or imitates, by having the same 'look and feel' as an existing program, if this involves no copying of the program code.[3]

This paper considers what contribution the law of contract can make towards protecting the interests of a software supplier, given that the scope of the parties' obligations and the extent to which these may be prescribed and varied by contractual arrangement can impact upon the level of protection derived for proprietary interests. Indeed, as we continue to see the 'law shaping technology and; technology shaping the law', an assessment can be made of how one branch of law shapes another – to what extent does copyright law shape the effect of contract law and vice versa, and what impact does this have upon software creators and users?

Given that the scope of intellectual property rights can be varied by contractual arrangement and conversely, those proprietary interests can override contrary stipulations expressed in a contractual agreement, something of the complexities facing software creators and acquirers when defining the scope of their rights and responsibilities towards each other is displayed. In certain circumstances, for example, in relation to error correction, a supplier may wish to vary the scope of the rights conferred on a lawful user, through express contractual terms.[4] In matters of decompilation however, the permissions legitimately conferred upon the lawful user cannot be varied or further restricted by the supplier through contractual provision.[5] As legislative controls

[1] *Navitaire Inc v EasyJet Airline company and Bulletproof Technologies Inc* [2004] EWHC 1725 (Ch)
[2] *Nova Productions Ltd v Mazooma Games Ltd & Others* [2007] EWCA Civ 219
[3] Allgrove & McGrath (2007) 'Pool Cues and Computer Games: the 'look and feel' debate played out in the Court of Appeal', *Computers & Law,* 18 (2) page 5
[4] Copyright, Designs and Patents Act 1988, section 50C.
[5] Copyright, Designs and Patents Act 1988, section 50B.

determine the extent of the parties' proprietary interests, these operate contrary to the notion of contractual freedom for the parties to apportion the risks as they consider appropriate - an example of where the law of copyright prevails over contract. Proprietary rights are not personal contractual rights but will nonetheless impact upon the rights and responsibilities of the contracting parties, for in certain circumstances copyright law prescribes the scope and form which those rights and obligations shall take.

Here the scope for tension between copyright and contract is illustrated, and examined with reference to the acts of a lawful user expressly permitted by statute: the making of a back up copy; the act of decompilation; and observing, studying and testing of computer programs.[6] Noting that the software industry is unlikely to achieve its desired level of protection of proprietary interests through copyright law alone, the effectiveness and appropriateness of the law of contract to promote additional layers of protection, the clarity with which this may be achieved, whilst preserving a balance of the interests of the parties, shall be assessed.

[6] Copyright, Designs and Patents Act 1988, sections 50A, 50B and 50BA.