

Nova Games

Following in the footsteps of the recent decision of *easyJet v Navitaire*, this is a case that tests the boundaries of the protection provided by the law of copyright and provides some guidance as to the distinction between “idea” and “expression”.

Nova Productions Limited v Mazooma Games Limited and Others; Nova Productions Limited v Bell Fruit Games Limited; (2007) EWCA Civ 219; Court of Appeal (The Chancellor of the High Court, Sir Andrew Morritt, Jacob LJ and Lloyd LJ)

Context

Copyright, Designs and Patents Act 1988 (“CDPA”):

Section 3(1): “In this Part [of the CDPA] “literary work” means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes-

- (a) ...
- (b) a computer program
- (c) preparatory design material for a computer program, and
- (d)”

Section 3(2): “Copyright does not subsist in a literary ... work unless and until it is recorded, in writing or otherwise....”

The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”):

Article 1: “Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”

Article 9.2: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”

The Facts

The case relates to Nova’s computer game based on the game of pool and called “Pocket Money”. Nova claimed that both Mazooma and Bell Fruit had infringed its copyright with their computer games also based on pool and called, respectively, “Jackpot Pool” and “Trick Shot”. At first instance, Nova relied on four different copyrights: (i) copyright in the artistic works being the bitmap graphics and frames displayed to the user; (ii) copyright in the literary works being Nova’s designer’s game design notes and the program written to implement the game; (iii) copyright in the dramatic work embodied in the game itself;

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and (iv) film copyright. On appeal, however, Nova relied only on its artistic copyright and literary copyright.

None of the findings of fact from the first instance decision were challenged. To the extent that the facts were relevant to the appeal, Jacob LJ relied on the wording of the first instance judgment. In particular, Jacob LJ noted the following facts:

- (i) the visual appearance and the rules of the three games were all very different;
- (ii) it was not contended that either of the defendants had access to the code underlying Nova's game;
- (iii) the use of a pulsating power meter to enable the player to choose the strength of shot was commonplace, having the pulsing meter go from left to right was a common choice, the colour scheme chosen was also a common choice;
- (iv) using a line to indicate the direction of shot was simple and commonplace;
- (v) it was desirable to have a dotted line rather than a solid line to prevent "aliasing";
- (vi) it was common ground that having a cue rotate around the cue ball was an obvious way of letting a player choose the direction of the shot;
- (vii) showing the table in plan view is commonplace;
- (viii) showing the pulsating power meter in an animation cycle was not commonplace, but was one of the obvious ways of implementing the commonplace idea of having a pulsating power meter; and
- (ix) having values associated with pockets was very common in video pool games.

The case on artistic works

It was common ground that the individual frames were graphic works for the purposes of the CDPA and Nova conceded that the individual frames had not been copied (i.e. each defendant had drawn its own pool table, balls, etc). However, focussing in particular on the pulsating power meter and cue, Nova attempted to argue that the combination of a series of those graphic works somehow gave rise to a separate copyright work. What the defendants had done was to:

"create a dynamic 're-posing' of the Claimant's version – one in which the detail of the subjects had changed, but an essential detail of the artistic element of the original was carried through to the Defendants."

The case on literary works

The CDPA, as amended in accordance with the Software Directive, provides that the preparatory materials for a computer program can themselves be copyright works. Nova argued that this was intended to provide copyright protection for the computer programmer's/game designer's skill in developing the idea, or the collection of ideas, for the game. This, so that argument ran, was what had been copied by the Defendants in producing arcade games that collected together the same features as Nova's game.

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The Decision

Jacob LJ gave the leading judgment (with which Lloyd LJ and Sir Andrew Morritt agreed without further comment) and dismissed the appeal on all counts.

In relation to the case on artistic works, Jacob LJ held that a series of drawings is a series of graphic works, not a single graphic work. Accordingly, the artistic work claimed, that is the collection of frames comprised in the games, did not amount to an artistic work for the purposes of the CDPA and so there could be no infringement. He did, however, go on to say that even it had been a copyright work the defendants could not be said to have taken a substantial part.

Jacob LJ was equally unimpressed by the case on literary works. He held that there could indeed be copyright protection for the preparatory materials for a computer program, but only to the extent that they amounted to a literary work. Nothing in the CDPA, the Software Directive or even TRIPS suggested that copyright would protect abstract ideas. Since the ideas that were common to all the games were commonplace and looked very different in their implementation in each game, there was no infringement of the literary copyright in Nova's computer program (applying *Navitaire v easyjet*¹). Jacob LJ went on to confirm that the *Navitaire* case was correct in so far as it held that "merely making a program which will emulate another but which in no way involves copying the program code or any of the program's graphics is legitimate".

Comment

It is almost axiomatic to say that English copyright law protects the expression of an idea and not the idea itself. However, in today's world, where copyright is used as a tool to protect rights that would not traditionally have fallen within the ambit of copyright, such as format rights, exactly where the boundary between ideas and the expression of ideas falls has increasingly important consequences.

These consequences can perhaps be most keenly felt in the software development industry, whether computer games software or otherwise. It is clear following this case, together with the decision in *Navitaire*, that copying the idea underpinning a piece of software (or the "business logic" as it was called in *Navitaire*) without copying the code or the on screen displays does not amount to copyright infringement. Furthermore, as it is not possible to obtain patent protection for software "as such" in the UK, there is a gap in the protection afforded to software developers by UK intellectual property laws. How to plug that gap is the challenge.

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¹ [2004] EWHC 1725 (Ch)