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Symposium Introduction: Copyright Protection and Reverse Engineering of Software

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SYMPOSIUM: COPYRIGHT PROTECTION AND REVERSE ENGINEERING OF SOFTWARE

INTRODUCTION

*Robert A. Kreiss**

The Program in Law and Technology at the University of Dayton School of Law decided to sponsor a Scholarly Symposium on "Copyright Protection and Reverse Engineering of Software" to deal with an important issue that had split the computer industry: To what extent should copyright law allow reverse assembly of computer software? A number of major computer companies, including IBM, Apple, and Digital Equipment Company, took the position that reverse assembly involved unauthorized copying of copyrighted computer programs and should be illegal. Other major companies, including Sun Microsystems, NCR, Storage Technologies, and Amdahl believed that copyright law's goals of encouraging the creation of new works would be better served by allowing reverse assembly—a process they claimed was necessary in order to create compatible programs.

This split in the computer industry led to the creation, in the United States, of industry lobbying groups such as the Alliance to Promote Software Innovation and the American Committee for Interoperable Systems. Similar lobbying groups in Europe sought to influence the form and content of the European Software Directive, which was issued in May 1991.

Litigation on this issue culminated in two major appellate decisions in 1992: *Sega Enterprises Ltd. v. Accolade, Inc.*,¹ and *Atari Games Corp. v. Nintendo of America, Inc.*² In each of those decisions, appellate courts held that, under appropriate circumstances, reverse as-

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1. 977 F.2d 1510 (9th Cir. 1992).

2. 975 F.2d 832 (Fed. Cir. 1992).

sembly of computer programs could be fair use.³ These decisions, however, did not end the lobbying effort nor the split in the computer industry.

The Symposium took place on November 12-13, 1993, in Dayton, Ohio. The Symposium was organized to promote dialogue and discussion among various parties interested in reverse engineering of software and copyright protection. To that end, representatives from a variety of industry positions were invited as speakers and commentators. In addition, and equally important, a diverse group of copyright law professors who were interested in the underlying issues were invited to participate. The following invited participants were asked to present papers for the Symposium, and they were designated as speakers. They were (listed in order of presentation):

ANDREW JOHNSON-LAIRD

Johnson-Laird, Inc.
Portland, OR

ANTHONY L. CLAPES

I.B.M.
White Plains, NY

PROFESSOR DENNIS S. KARJALA

Arizona State University College of Law
Tempe, AZ

VANESSA MARSLAND

Clifford Chance, London, England

PROFESSOR JAAP SPOOR

3. "Fair use" is a copyright doctrine permitting certain uses of copyrighted works that would otherwise constitute infringement. It is codified in § 107 of the Copyright Act, which states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1988 & Supp. II 1990).

Vrije Universiteit
Amsterdam, Netherlands

PROFESSOR MARSHALL A. LEAFFER
University of Toledo College of Law
Toledo, Ohio

PROFESSOR DAVID D. FRIEDMAN
Cornell Law School
Ithica, New York

PROFESSOR DAVID A. RICE
Rutgers University School of Law
Newark, New Jersey

PROFESSOR JAMES P. CHANDLER
George Washington University Law School
Washington, D.C.

The invited commentators were asked to read the papers in advance to facilitate the discussions at the Symposium. These individuals were (alphabetically):

PETER CHOY
Sun Microsystems, Inc.
Mountain View, California

PROFESSOR ROCHELLE COOPER DREYFUSS
New York University Law School
New York, New York

GREGORY HANDSCHUH
Amdahl Corp.
Sunnyvale, California

DAVID HAYES
Fenwick & West
Palo Alto, California

RON REILING
Digital Equipment Corp.
Maynard, Massachusetts

EMERY SIMON
Alliance to Promote Software Innovation
Washington, D.C.

BARRY WEISS
Gordon & Glickson
Chicago, Illinois

The Chairman of the Symposium was

ROBERT A. KREISS

Director, Program in Law and Technology & Associate Professor
of Law

University of Dayton School of Law

Dayton, Ohio 45469-1320

The resulting mixture of discussion and dialogue between academicians and practicing attorneys was exhilarating. As one law professor later wrote, "What a wonderful conference! You managed to get a very even representation of views, great speakers, and an organization that generated *the most productive set of conversations ever heard on an 'academic' weekend.*"⁴

The Symposium sought breadth as well as depth. To that end, participants were chosen so that issues of innovation, competition, compatibility, fair use, misuse, and preemption would be considered. Because these issues were already the subject of intense lobbying in Europe and would presumably be the subject of further lobbying elsewhere in the world, the discussions were structured and designed to transcend national boundaries.

Early in the planning, it became apparent that one's views of the proper copyright policy on the issues were likely to be heavily influenced by one's understanding of, or assumptions about, the art and technology of reverse assembly and by one's understanding of the economics of the computer software industry. One speaker⁵ was asked to give a background presentation on what reverse assembly was, how it was done, how easy or difficult it was to do, and what it could and could not accomplish. Another speaker⁶ was asked to raise issues concerning the economics of copyright law and fair use.

All of the speakers provided a written paper for the Symposium and made an oral presentation. Following each presentation the floor was opened for discussion. The discussions were invariably lively. The speakers were invited to revise their papers in light of those discussions, with a number of speakers doing just that. Eight of the finished papers are contained in this issue of the University of Dayton Law Review.

The initial suggestion for the topic for the Scholarly Symposium came from a Steering Committee which had been established to consider possible topics, speakers, and formats. The Steering Committee played a crucial role in planning for the Symposium. Committee mem-

4. Letter from Professor Rochelle Dreyfuss to the author (Nov. 15, 1993) (emphasis added).

5. Andrew Johnson-Laird.

6. Professor David D. Friedman.

bers were Karen J. Blackwell (The Reynolds & Reynolds Co., Dayton, Ohio); L. Norton Cutler, Jr., (A.T.&T., Dayton, Ohio); John W. Donahue (Biebel & French, Dayton, Ohio); Sharen Swartz Gage (Thompson, Hine & Flory, Dayton, Ohio); Michael A. Jacobs (Mead Data Central, Inc., Dayton, Ohio); Stephen F. Jewett (A.T.&T., Dayton, Ohio); Professor Robert Kreiss, Chair (University of Dayton School of Law); and Charles N. Shane, Jr. (Mead Corp., Dayton, Ohio).

The Scholarly Symposium would not have been possible without financial support by a number of corporate and law firm Sponsors. These Sponsors were (alphabetically):

AMDAHL CORPORATION
ARTER & HADDEN (CLEVELAND, OHIO)
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STORAGE TECHNOLOGY CORPORATION
SUN MICROSYSTEMS

The University of Dayton School of Law gratefully acknowledges the contributions of these firms and corporations, without which there would not have been a Symposium.

Primary responsibility for planning the Symposium fell on my shoulders as Chairman. I solicited the sponsorships, solicited input from law professors and people in industry as to whom we should invite, and invited the speakers. I am particularly grateful that none of the sponsors attempted to impose any private agendas as to who should be invited or not invited, and none of the sponsors exerted any undue pressure on me to give the program any particular slant.

As readers of this Symposium will discover, the copyright issues relating to reverse engineering of software are difficult and important. The speakers, commentators, and attendees at the Symposium addressed these issues. I invite you, the reader, to join in the discussion that they began.