93-5202

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNIX SYSTEM LABORATORIES, INC.,

Plaintiff/Appellant,

v.

BERKELEY SOFTWARE DESIGN, INC., ET AL.,

Defendants/Appellees

Appeal From the United States District Court
For the District of New Jersey

BRIEF AMICUS CURIAE OF AMERICAN COMMITTEE FOR INTEROPERABLE SYSTEMS

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INTEREST OF AMICUS CURIAE

The American Committee for Interoperable Systems ("ACIS") is an informal organization of companies that develop innovative software and hardware products which interoperate with computer systems developed by other companies.[1] Every member of ACIS believes that computer programs deserve effective intellectual property protection to give developers sufficient incentive to create new computer programs. At the same time, the members of ACIS are concerned that the improper extension of intellectual property protection generally, and of copyright law in particular, will impede innovation and inhibit fair competition in the computer industry. ACIS seeks the application of legal standards that will effectuate copyright law's fundamental aims, assuring authors "the right to their original expression," but encouraging competitors "to build freely upon the ideas and information conveyed by a [copyrighted] work." Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (1991).

ACIS takes no position on the issues of copyright validity or trade secret misappropriation decided below. ACIS is, however, vitally concerned with the guidance that this Court may give on the difficult question of scope of protection in the event of remand and in light of dicta in

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1 A list of ACIS members is attached as an addendum.

this Court's decision in Whelan Associates, Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987). Absent appropriate guidance from this Court, the District Court is likely to follow Whelan and thus could give improperly broad copyright protection to the computer program at issue in this case, requiring yet another remand. Such unduly broad protection for computer programs would also have serious anticompetitive consequences for ACIS members and the computer industry.

SUMMARY OF ARGUMENT

The Whelan decision contains dicta that could be understood as extending copyright protection to all nonliteral elements of a computer program[2] except the most general description of the program's function. This Court should seek an opportunity to prevent such a broad reading of the Whelan dictum because, as four other Circuits have already found, such a broad reading conflicts with traditional copyright principles. Additionally, continued adherence to a broad reading of the Whelan dictum would have

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2 The phrase "non-literal elements" refers to all elements of a computer program other than the literal object and source code. Although under certain circumstances "non-literal" user interfaces pose different analytical problems from the "non-literal" internal structure of a program or program-to-program interfaces, for present purposes all non-literal elements can be considered together.

an adverse impact on competitive conditions in the computer industry.

ARGUMENT

I. COURTS AND COMMENTATORS HAVE INTERPRETED DICTA IN WHELAN AS DRAWING THE LINE BETWEEN UNPROTECTED IDEA AND PROTECTED EXPRESSION AT A VERY HIGH LEVEL OF ABSTRACTION

In dicta, the Whelan Court defined the unprotectable idea in the program at issue to be "to run a dental laboratory in an efficient way," Whelan, 797 F.2d at 1238 n.34, while the protectable expression was "the manner in which the program operates," including non-literal elements such as the program's internal structure and organization as well as its user interfaces. Id. at 1239. Subsequent courts and commentators have interpreted the Whelan dictum as drawing the line between idea and expression at a very high level of abstraction,[3] suggesting the availability of copyright protection for virtually everything in a computer program except the most general statement of its function.[4]

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3 See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2nd Cir. 1930), cert. denied, 282 U.S. 902 (1931).

4 See, e.g., 3 Melville & David Nimmer, Nimmer On Copyright, § 13.03[f] at 13-78.34 (1993); Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 705 (2d Cir. 1992).

Indeed, some courts and commentators refer to a "Whelan rule" that a computer program contains but one idea.[5]

It is far from clear that this Court intended to establish any such rule,[6] but the dictum unfortunately has taken on a life of its own. If it did not intend to establish such a rule, this Court should take this opportunity to clarify its position lest other courts, notably the District Court below, be led astray. If it did intend to establish such a rule, we encourage the Court to reverse it because the rule conflicts with traditional copyright principles and has an adverse impact on competitive conditions in the computer industry. The rest of this brief explains why ACIS believes this Court should act now to revise the Whelan dictum as it has been interpreted by other courts.

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5 Id. ACIS does not dispute Whelan's holding that copyright law protects expression in the non-literal elements of a computer program for this holding simply restates the fundamental copyright principle that copyright protects only original expression. In a computer program, original expression could be found in both literal and non-literal elements. The difficult task before a court is to determine which non-literal elements to protect and which to place in the public domain; that is, at what level of abstraction to draw the line between idea and expression. It is this aspect of Whelan -- where the Court purportedly drew this line -- that ACIS challenges.

6 See, e.g., Whelan, 797 F.2d at 1238 n.34.

II. RECENT DECISIONS IN OTHER CIRCUITS REJECT THE WHELAN DICTUM'S OVER-BROAD COPYRIGHT PROTECTION FOR NON-LITERAL ELEMENTS OF COMPUTER PROGRAMS

The Whelan opinion appeared to give two justifications for drawing the idea/expression line at a high level of abstraction. First, the Court noted that "among the more significant costs in computer programming are those attributable to developing the structure and logic of the program" and that protecting the structure and logic "would provide the proper incentive for programmers by protecting their most valuable efforts . . . ." Whelan, 797 F.2d at 1237. Second, the Court observed that computer programs are "literary works," and that copyright in other types of literary works is infringed if competitors use the works' structure and organization. Id. at 1234, 1238.

Courts in other circuits quickly rejected the approach taken in these dicta. In Plains Cotton the Fifth Circuit recognized that although computer programs are literary works, they also are utilitarian and thus strictly constrained by external factors:

> [A]ppellees presented evidence that many of the similarities between the GEMS and Telcot programs are dictated by the externalities of the cotton market. To that extent, the facts of this case fit squarely within Synercom's powerful analogy to the hypothetical development of gear stick patterns. The record supports the inference that market factors play a significant role in determining the sequence and organization of cotton marketing software, and we decline to hold that those patterns cannot constitute "ideas" in a computer context.

Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., 807 F.2d 1256, 1262 (5th Cir. 1987), cert. denied, 484 U.S. 821 (1987) (citing Synercom Technology v. University Computing Co., 462 F. Supp. 1003 (N.D. Tex. 1978)) (other citations and footnotes omitted). Accordingly, the Plains Cotton Court explicitly "decline[d] to embrace Whelan." Id.

More recently, the Second Circuit in Computer Associates declined to follow the Whelan dictum. The Court observed that:

> [A] computer program's ultimate function or purpose is the composite result of interacting subroutines. Since each sub-routine is itself a program, and thus, may be said to have its own "idea," Whelan's general formulation that a program's overall purpose equates with the program's idea is descriptively inadequate.

Computer Associates, 982 F.2d at 705.

Moreover, the Second Circuit challenged the Whelan dictum's two justifications. First, while acknowledging that computer programs were "literary works," the Computer Associates Court recognized the "essentially utilitarian nature of a computer program," and emphasized that, "compared to aesthetic works, computer programs hover even more closely to the elusive boundary line described in Section 102(b)." Id. at 704. Like the Plains Cotton Court, the Second Circuit understood that, as utilitarian works, computer programs are highly constrained by external factors:

> Professor Nimmer points out that "in many instances it is virtually impossible to write a program to perform particular functions in a specific computing environment without employing standard techniques." This is a result of the fact that a programmer's freedom of design choice is often circumscribed by extrinsic considerations such as (1) the mechanical specifications of the computer on which a particular program is intended to run; (2) compatibility requirements of other programs with which a program is designated to operate in conjunction; (3) computer manufacturers' design standards; (4) demands of the industry being serviced; and (5) widely accepted programming practices within the computer industry.

Id. at 709-10 (citations omitted). Copyright does not protect program elements dictated by such external factors. Id. Nor does copyright protect elements dictated by the need to implement a process efficiently. Id. at 707.

Second, the Computer Associates Court rejected Whelan's incentive-based justification for broad copyright protection as having "a corrosive effect on certain fundamental tenets of copyright doctrine." Id. at 712. In response to the argument that programmers will not invest the time, energy and funds required to design and improve program structures if copyright does not guarantee them broad protection for their work, the Second Circuit stated:

> The interest of the copyright law is not in simply conferring a monopoly on industrious persons, but in advancing the public welfare through rewarding artistic creativity, in a manner that permits the free use and development of non-protectable ideas and processes.

Id. at 711.

Significantly, the two foregoing points flow directly from the United States Supreme Court's recent decision in Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991). With respect to the argument that a computer program is a literary work, the Supreme Court made clear that merely calling a work a "literary work" does not determine the scope of its copyright protection and that not all literary works are entitled to the same scope of protection: "the copyright in a factual compilation is thin"; "[t]his Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works." Feist, 111 S. Ct. at 1289, 1290. See generally 1 Paul Goldstein, Copyright Principles: Law and Practice, § 2.15 at 195-98 (1989); 1 Nimmer, § 2.11 [A]-[B]. Similarly, with respect to the incentive-based justifications, "Feist teaches that substantial effort alone cannot confer copyright status on an otherwise uncopyrightable work . . . . Thus, Feist implicitly undercuts the Whelan [incentive based] rationale . . . ." Computer Associates, 982 F.2d at 711.

The Second Circuit noted that while the Whelan dictum has fared "poorly in the academic community,"[7] some

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7 For example, the two leading copyright treatises have rejected Whelan's rationale. 1 Goldstein § 2.15.2 at 209-10; 3 Nimmer § 13.03[f] at 13-78.34. See also LaST Frontier Conference Report on Copyright Protection of Computer Software, 9 Computer L. Rep. 961 (1989).

lower courts have adopted its reasoning. Id. at 705. But, even before the Computer Associates decision, the trend has been away from the Whelan dictum, and this trend has accelerated in the year since the Second Circuit's ruling. The Court of Appeals for the Federal Circuit relied on both Plains Cotton and Computer Associates in holding that:

> [A] computer program contains many distinct ideas. . . . The court must filter out as unprotectable the ideas, expression necessarily incident to the idea, expression already in the public domain, expression dictated by external factors (like the computer's mechanical specifications, compatibility with other programs, and demands of the industry served by the program), and expression not original to the programmer or author.

Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 839 (Fed. Cir. 1992) (citations omitted). The Federal Circuit, the court of penultimate record in patent appeals, suggested that the elements the Whelan dictum would protect under copyright law are actually the subject matter of patents:

> [C]opyright protection does not "extend to any . . . procedure, process, system [or] method of operation." In conformance with the standards of patent law, title 35 provides protection for the process or method performed by a computer in accordance with a program. Thus, patent and copyright laws protect distinct aspects of a computer program. Title 35 protects the process of method performed by a computer program; title 17 protects the expression of that process or method.

Id. (citations omitted).

Similarly, the Ninth Circuit agreed with the Second Circuit that Whelan's dictum was "descriptively inadequate." Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1525 (9th Cir. 1992) (citation omitted). The Sega Court recognized that computer programs "contain many logical, structural, and visual display elements that are dictated . . . by considerations of efficiency, or by external factors such as compatibility requirements and industry demands." Id. at 1524 (citing Computer Associates). The Ninth Circuit concluded that:

> Under . . . the test recently adopted by the Second Circuit in [Computer Associates], many aspects of the program are not protected by copyright. In our view, in light of the essentially utilitarian nature of computer programs, the Second Circuit's approach is an appropriate one.

Id. at 1525.

Courts in the Tenth Circuit have also ruled against the Whelan dicta. The district court in Micro Consulting, Inc. v. Zubeldia, 813 F. Supp. 1514, 1528 (W.D. Okla. 1990), aff'd., 959 F.2d 245 (10th Cir. 1992) rejected Whelan, noting that "[c]ommentators have agreed for the most part that the test in Whelan 'extend[s] copyright protection too far,' . . . and that the crucial flaw in the rule announced in Whelan is that it 'assumes that only one 'idea,' in copyright law terms, underlies any computer program . . .'" (citations omitted). The Tenth Circuit Court of Appeals in an unpublished opinion affirmed the district court, stating

that the lower court's "legal conclusions are correct" and that it "affirm[ed] for substantially the reasons stated therein."

Finally, courts abroad have joined in rejecting the Whelan dictum. In John Richardson Computers Ltd. v. Flanders and Chemtec Ltd. (Feb. 19, 1993), the English High Court of Justice, Chancery Division, extensively reviewed United States software copyright decisions. After discussing the Whelan dictum and its rejection by the Computer Associates court, the Richardson court concluded it would follow Computer Associates. Slip Op. at 42. Likewise, the Ontario Court of Justice in Delrina Corp. v. Triolet Sys., Inc., 1993 Ont. C.J. LEXIS 219 (Feb. 12, 1993), adopted the Computer Associates standard for the scope of protection.

In sum, the Whelan dictum has been rejected explicitly by the Second, Fifth, Ninth and Federal Circuits, and at least implicitly by the United States Supreme Court and the Tenth Circuit. This Court should join these other Courts in rejecting the Whelan dictum.[8]

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8 The following district courts have rejected the Whelan dicta as well: Apple Computer, Inc. v. Microsoft Corp. and Hewlett-Packard Co., Copy L. Rep. (CCH) 26,954, 25,554 (N.D. Cal. Aug. 7, 1992); CMAX/Cleveland, Inc. v. UCR, 804 F. Supp. 337 (M.D. Ga. 1992); Softel v. Dragon Medical, 1992 WL 168190 (S.D.N.Y.); EDI v. SSI, 785 F. Supp. 576 (E.D. La. 1991) (on appeal); Comprehensive Technology Int'l, Inc. v. Software Artisans, Inc., (E.D. Va. 1992), aff'd in part, vacated in part, 1993 U.S. App. LEXIS 21706 (4th Cir. Aug. 25, 1993). Only one court has explicitly rejected Computer Associates: Gates v. Bando, 798 F. Supp. 1499 (D. Colo. 1992). This case is now on appeal to the Tenth Circuit.

III. WHELAN'S OVERBROAD COPYRIGHT PROTECTION FOR NON-LITERAL ELEMENTS OF COMPUTER PROGRAMS WOULD SERIOUSLY INJURE THE COMPUTER INDUSTRY AND CONSUMER WELFARE

Dramatic changes in the computer industry over the past decade make the balanced protection offered by Computer Associates more appropriate, and the over protection suggested by the Whelan dictum more dangerous, than ever. With the personal computer revolution and the recent major improvements in communications technology, an overwhelming need has emerged for interconnection between different elements of computer systems. Within a given company, literally thousands of personal computers and workstations scattered across the globe need to interact with each other and with the company's mainframes or supercomputers. Moreover, different users need to exchange vast quantities of data with one another through their computers.

A computer system, however, is an unforgiving environment. Unless a computer program conforms to the precise rules for interacting with the other elements of the system, no interaction between the program and the system is possible. As Computer Associates correctly found, these rules of interaction -- "interface specifications" in computer parlance -- often dictate the contours of a computer program's non-literal elements. If the developer of the first program that embodies these interface specifications could use copyright law to prevent all subsequent

developers from writing programs using the same non-literal elements to comply with the required interface specifications, the first developer could prevent all subsequent developers from filling the same functional niche in the computer system.

Such a broad monopoly would have serious implications for consumer welfare.[9] In the absence of competition, the first developer would have little incentive to develop more innovative and less costly products. These negative consequences would be compounded by the fact that similar monopolies would exist everywhere computer programs are used in a computer system, e.g., applications software, systems software such as the operating systems at issue in this case, and the software embedded in peripherals such as terminals, printers and memory devices.

Moreover, computer chips containing copyrightable programs now routinely control important functions in a wide variety of non-computer products, such as automobiles and microwave ovens. Excessive protection for the interfaces of

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9 See Peter B. Menell, An Analysis of the Scope of Copyright Protection for Application Programs, 41 Stan. L. Rev. 1045, 1082, 1097 n.281 (1989); Peter G. Spivak, Does Form Follow Function? The Idea/Expression Dichotomy In Copyright Protection of Computer Software, 35 U.C.L.A. L. Rev. 723, 765 (1988). See also Computer Associates, 982 F.2d at 711-12; Richard Moreno, Note, "Look and Feel" as A Copyrightable Element: The Legacy of Whelan v. Jaslow? Or, Can Equity in Computer Program Infringement Cases Be Found Instead By the Proper Allocation of Burden of Persuasion, 51 U. La. L. Rev. 177, 206 (1990).

these programs would allow the automobile or microwave oven manufacturer to exercise undue power in the market for components that interact with these programs. In short, the excessive copyright protection prescribed by the Whelan dictum would result in what the Second Circuit terms "monopolistic stagnation." Computer Associates, 982 F.2d at 696.

IV. CONCLUSION

A broad interpretation of the Whelan dictum has been rejected by every other circuit court that has considered it. Clarifying the dictum now would not require this Court to overrule Whelan's sound holdings on the protectability of non-literal elements and the elimination of the audience test in software copyright cases. At the same time, clarifying the Whelan dictum would remove the appearance of a legal standard that is inconsistent with longstanding copyright principles, the applicable law in other circuits,

and consumer welfare. Accordingly, this Court should provide appropriate guidance to the District Court by explicitly repudiating the Whelan dictum.

Respectfully submitted,

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Landmark Systems Corporation
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Software Entrepreneurs Forum**
Storage Technology Corporation
Sun Microsystems, Inc.
Systems Center, Inc.
Tandem Computers, Inc.
Unisys Corporation
Western Digital Corporation
Zenith Data Systems Corporation

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* *The Software Association of Oregon consists of 430 software development firms, firms in associated industries, and individuals professionally involved in software development.*

** *The Software Entrepreneurs Forum consists of over 1,000 software entrepreneurs and developers.*

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of September, 1993, a true and correct copy of Brief Amicus Curiae of American Committee for Interoperable Systems ("ACIS") and ACIS' corresponding Motion for Leave to file an Amicus Brief were mailed via first class mail, postage prepaid, to the following:

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