



Court dismisses “copyright champion’s” source code copyright suit

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.....Greg Aharonian, an IEEE intellectual property activist, describes himself as a “champion [of] the American public’s interests” in the patent and copyright systems. In carrying out this self-assigned role, he sued US Attorney General Alberto Gonzales in US district court in San Francisco for a declaratory judgment. Aharonian wanted the court to declare that copyright law cannot legally be applied to protect computer source code. The court disagreed and dismissed his case (*Aharonian v. Gonzales*, N.D. Cal., No. C04-5190, Order of Jan. 3, 2006).

One of Aharonian’s projects is to reduce the cost of patent and copyright litigation. His day job (see www.bustpatents.com) is to find prior art that the Patent and Trademark Office (PTO) missed when it issued a patent under which a client is being sued.

“I bust patents for a living,” Aharonian says. Furthermore, he thinks that when the PTO grants software patents, “they’re issuing crap at the speed of light.” In particular, he thinks that PTO examiners are oblivious to all the source code out there—some of which predates other work that, unfortunately, examiners are issuing patents on every day. Why do PTO examiners miss this other source code? Because they only search for prior art contained in existing patents.

Aharonian, therefore, wants to catalog all the prior-art source code and make it

commercially available for patent busting (www.bustpatents.com/sorecode.htm). In addition, he hopes to construct an automated prior-art search tool that uses a prior-art source code database, an expert system for searching the database, and an analytic tool that determines whether source code for which intellectual property rights are claimed approximates something in the database.

But US copyright law drops a fly in his ointment: Aharonian is concerned that the courts will find him guilty of copyright infringement for reproducing and distributing someone else’s source code by copying it into his database and making it available to his customers. (Google has been sued as a copyright infringer—so far unsuccessfully—for caching Web sites.) Federal courts on the West Coast have already determined that placing computer code into digital memory falls under section 106(1) of the US copyright law, which prohibits unauthorized reproduction of literary material. Aharonian has therefore asked the court to declare that no valid provision of copyright law prevents him from carrying out his source code project.

Aharonian’s arguments

Aharonian, a computer programmer acting as his own lawyer, argued as follows:

- Computer source code consists entirely of algorithms and data structures, ideas or processes that are not protected under copyright law.

- The terms “idea” and “expression” in copyright law are vague and violate the due process clause of the US Constitution, making copyright laws based on or embodying this terminology unconstitutional, as applied to computer source code.
- Congress never properly added computer source code to the types of works that copyright law protects.
- Copyright law’s use of the term “mathematical concepts” is too vague for due process.
- The term “computer program” is too vague for due process.

Court agrees that Aharonian has standing to complain

The government challenged Aharonian’s “standing” to sue over these issues. It claimed that he raised only hypothetical, speculative questions and had no tangible, immediate dispute with the government.

But the court disagreed, ruling that Aharonian had standing. It said that he was economically injured if the copyright law prevented him from including copyright-protected works in his database. (The copyright law has criminal punishments for substantial commercial infringement.) The court found that Aharonian “articulated a specific economic benefit from copying currently protected material,” because incorporating copyright-protected source code into his database would improve the database’s commercial value. That was enough, the court felt, to create a nexus

between the copyright law issues and the alleged economic damage to Aharonian's business. Two key factors were that Aharonian has an existing business that involves searching for prior art, and that "he has made a credible argument that [copying the source code] into an automated search tool would result in additional profits."

Algorithms and data structures

The court then turned to Aharonian's five claims, beginning with his request for a declaration that software consists entirely of algorithms and data structures. The court refused to make the type of general pronouncement that Aharonian sought, first on general principles and second because such a pronouncement would have no clear effect on the database project's development. The court called Aharonian's claim "a generalized grievance that this court declines to adjudicate." In addition, the court believed that Aharonian fundamentally misunderstood the relationship between copyright and patents. Aharonian insisted that software codes are potentially patentable ideas "that are beyond the scope of copyright protection." But the court said that for Aharonian to copy source code that copyright law protects would infringe the copyright for the code regardless of whether the ideas embodied in the code are patentable. (In other words, copyright law may properly protect the expressive aspects of the code, while patent law may properly protect the implementations of ideas in the code.)

Vagueness issues

The court first addressed Aharonian's argument that "idea" and "expression" have a special meaning in relation to source code and object code. But Congress provided no guidance as to what that special meaning should be. Aharonian said such vagueness violated due process. Instead, Congress just left it up to the courts to puzzle out, which Aharonian considered unconstitutional. The court disagreed. Leaving it up to the courts to figure out what laws mean "is not merely permissible—it is a bedrock assumption of our

common law system." Therefore, it does not violate due process to require Aharonian to obtain assistance from the courts to determine with certainty whether his acts violate the copyright laws.

Using similar reasoning, the court turned away Aharonian's other vagueness complaints.

Defective enactment

Aharonian's final charge was that Congress did not properly extend copyright protection to computer software, so that it is improper to apply copyright law to software. The problem, which the court did not bother to address in detail, is that section 102(a) gives a list of types of work to which copyright law applies: literary works, musical works, pictorial works, pantomimes, and so on. Congress never specifically put computer programs into the list. It did not even bother to say that computer programs are a subspecies of another item on the list (for example, a type of literary work). Instead, Congress just tacitly assumed that computer programs are eligible for copyright protection. The court said that it didn't matter.

No amendment

Finally, the court refused Aharonian's request to amend his complaint, despite the general rule that grants liberal permission to amend. In Aharonian's case it would be futile, the court felt, since he has been totally unable to come up with a legal theory that withstands scrutiny. Of the court's ruling, Aharonian said, it held that "there was no possible set of facts in the universe, which if presented during trial, could have led to any judgment in my favor."

Aharonian has said that he will follow up the district court's ruling with an appeal (www.iplaw-quality.com/lawsuit).

Fair Use

However defectively packaged it was for the court's consumption, Aharonian's rant list points out many shortcomings of the US copyright system's treatment of computer software. But, alas, that train left the station many years ago.

Curiously, Aharonian failed to ask for a

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**The court believed
that Aharonian
fundamentally
misunderstood the
relationship between
copyrights and
patents.**
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court declaration releasing him from copyright liability on the basis of fair use. Recent precedent, including the Ninth Circuit's *Arriba Soft* decision upholding an image search engine's use of thumbnails, supports a fair-use argument. This line of precedent approves the argument that a use of copyright-protected material to provide the public with a new and useful function, one unavailable without the challenged use, can be excused from liability because it is "transformative." For example, the US Supreme Court said that rap group 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" ("big hairy woman ...") was fair use because it transformed the original song. The Court determined that the group created new meaning and gave the public the benefit of new ideas about the song (that the concept in Orbison's version is vapid and foolish) without encroaching on the original's regular market (so-called "supersessive" use).

In Aharonian's case, he uses the copyright-protected source code to provide users with a new function that could not be realized without the database storing the code. Moreover, his use does not supersede the commercial market for the original code because he does not run the code in a task for which the original code was designed. Instead, he uses the copyright-protected code only for comparison with other code to determine infringement—a new and useful function. Whether this argument would have carried

the case is uncertain, but it might have had a reasonable chance of success.

The main problem with the fair-use argument here is that it might seem too abstract because no specific example of copyright-protected source code is available for comparison in this lawsuit. Fair use is usually decided on a case-by-case, fact-specific basis. Still, maybe this case doesn't leave room for variation in the fact pattern. The use is always for the same purpose (comparison), and it is never supersessive.

Room for a compromise?

It might be tempting to argue for a com-

promise: Let Aharonian put the source code in his database but make him pay a license fee for it. That won't work, however, for the same reason that 2 Live Crew didn't have to obtain a license from the "Oh, Pretty Woman" copyright owner. If parodists or writers of negative criticisms were required to obtain licenses, there would be no more parodies or scathing reviews. Copyright owners, curiously, do not want to license such use of their works. By the same token, ordinarily Aharonian's purpose is to provide his client with a basis to invalidate a patent that Aharonian considers as representative of what

the PTO "issues at the speed of light." That is not the type of use an owner of copyright-protected code would want to encourage, much less voluntarily license, which pretty well eliminates any voluntary compromise solution. It's either fair use or garden-variety infringement.

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