Derivative Works:
Statute and Case Law

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Overview of Derivative Works Discussion

The Statute: Copyright Act Definitions and Rules

Case Law: Some Are Here, Some Are There, Some Are Nowhere
- Abstraction, Filtration, Comparison
- Analytic Dissection
- No Protection for "Methods of Operation"
- Still Mum

Example Fact Patterns
- Literal Copying
- No Literal Copying

What's Free Software to Do?

Software Derivative Works: The Statute

Copyright Act Definitions and Rules

- A "*computer program*" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result. 17 U.S.C. § 101

- A "*derivative work*" is a work based upon one or more preexisting works, such as a translation, ..., abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. 17 U.S.C. § 101

- "*In no case does copyright protection ... extend to* any idea, procedure, process, system, method of operation, concept, principle, or discovery..." 17 U.S.C. § 102(b)

- Creating a Derivative Work is an Exclusive Right of the Copyright Owner. 17 U.S.C. § 106(b)

Case Law: Some Are Here
2nd Cir AFC Test

A bstract Ideas from Expression

- Mirrors Process of Software Creation
- E.g., Purpose --> Architecture --> Algorithms --> SC --> OC

F ilter Out Unprotectable Expression

- No Ideas (102(b)): Aided by Abstraction
- Merger and Scenes a Faire Doctrines
- Public Domain
- Lacks Sufficient Originality: Constants

C ompare Protectable Expression to Second Work

- Substantial similarity?

Case Law: Some Are There
9ᵗʰ Cir Analytic Dissection Test

Identify substantial similarities in both ideas and expression

Use Analytic Dissection to Determine Protectable Features

Assign Level of Protection
- "Thin": non-copyrightable facts or ideas combined in a way that affords protection only from their alignment and presentation
- "Broad": copyrightable expression itself

Standard
- "Thin": virtual identity
- "Broad": substantial similarity

Case Law: Some Are There
1st Cir "No Methods of Operation" Test

No Protection for "Methods of Operation"

- Expressly rejects AFC

- Sec. 102(b) read broadly

  - "Method of Operation": the means by which users operate computers, including the menu command hierarchy

Case Law: Some Are Nowhere

4th Circuit: Virginia

7th Circuit: Chicago   **?**

Supreme Court

Example Fact Patterns and Analysis

Clear Cut Literal Copying of Code

- Slam Dunk Derivative Work?

Clear Cut No Literal Copying of Code

- Slam Dunk Not Derivative Work?

Frequency of Such Issues Arising

- In Court
- In GPL Compliance Activities
- Possible Reasoning

So Where are We?
And Where is Free Software to Go?

Fact: The law of derivative work is uncertain, unpredictable and, gosh-darnit, frustrating in and of itself, regardless of whether Free Software or the GPL exists or not.

Fact: To affect activity outside the boundaries of Copyright Law requires rights be received through an Enforceable Contract.

FSF's Philosophy re Software Distribution (aka Copyleft):

- Free Software Survives Best with Copyright Protection
- Abandoning Copyrights is Not the Best Way to Advance Free Software
- Copyright Licensing Better than Enforceable Contracting

GPL Goes as Far as Copyright Law Takes Software Derivative Work …

§ 0: "The 'Program', below, refers to any such program or work, and a 'work based on the Program' means either the Program or any derivative work under copyright law: that is to say, a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language."

§ 2: "You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program"

§ 2(b): "You must cause **_any work that you distribute or publish, that in whole or in part contains or is derived from the Program_** or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License."

… But Not One Step Beyond That.

§ 2 (cont.): "***If identifiable sections of that work are not derived from the Program***, and can be reasonably considered independent and separate works in themselves, ***then this License, and its terms, do not apply to those sections when you distribute them as separate works***. But when you distribute the same sections as part of a whole which is a work based on the Program, the distribution of the whole must be on the terms of this License, whose permissions for other licensees extend to the entire whole, and thus to each and every part regardless of who wrote it.

Thus, it is not the intent of this section to claim rights or contest your rights to work written entirely by you; rather, ***the intent is to exercise the right to control the distribution of derivative*** or collective ***works based on the Program***.

In addition, ***mere aggregation of another work*** not based on the Program ***with the Program*** (or with a work based on the Program) on a volume of a storage or distribution medium ***does not bring the other work under the scope of this License***."

Recap of Derivative Works Discussion

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