

A Status Report from the Software Decompilation Battle: A Source of Sores for Software Copyright Owners in the European Union and the United States?

Research project

Investigator:

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Abstract:

For traditional media, such as novels, copyright represents a “bargain” between the individual author and the general public: the author has an exclusive right to make and sell copies, but anyone can look at the novel, learn from its ideas, and use those ideas as a stimulus for the creation and a reward for the publication of new works. However, computer code by its unique nature, to wit, its invisibility, its not readily accessibility, makes it a quite unconventional subject matter for enjoying copyright protection all around the world. Thus, for software, which is generally available only as object code, the “bargain” is one-sided: the author gets a monopoly, but the public does not have access to even the uncopyrightable ideas contained in the code. Unless an explicit exception recognizes otherwise, copying of source code would violate the copyright holder's exclusive rights, even if the person who decompiled the code only used it as an interim step in gaining access to the program's functionality or developing a new, independent computer program. Given the vast profitability of computer software reverse engineering in general, and decompilation in particular, has evolved to a battle over the right of competitors to reverse engineer, including the necessity of intermediate copies of an original computer software. In the wake of establishing an identity in the global computing world, especially to be able to form a counterpart to the U.S. dominance in the market, the European Communities adopted the 1991 Directive on the Legal Protection of Computer Programs. With its decompilation exception the Directive manifests Europe's position in the overall reverse engineering battle, as one towards “open systems.” Yet the U.S. Copyright Act of 1976 does not contain any express provision on legitimizing intermediate copying in the course of software decompilation. Consequently, the U.S. legislatures left it up to the judiciary to define the policy on the subject. More recent case law, as well as the Digital Millennium Copyright Act indicates a shift in U.S. copyright law toward a “closed” proprietary model of software development. With the background of copyright policy considerations and the current legal treatment of software decompilation in both the EC and the United States, this research paper will not only re-consider Europe's position recently expressed in the *Microsoft* case but also point out possible ramifications of the compulsory licensing order imposed on Microsoft regarding its Window's interface information for the legal status of decompiling computer software in Europe as well as in the United States.

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