Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 4 *Volume IV*
Number 1 *Volume IV Book 1*

Article 28

1993

Panel Discussion

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PANEL DISCUSSION

PROFESSOR FRYER: Professor Reichman has made an important proposal concerning computer program protection. He suggests a separate protection system for computer programs. He uses design protection law and practice to support this proposal.

I do not recommend a separate system to protect computer programs, for several reasons. Perhaps it is my practical side that influences me most, after more than thirty years as a patent attorney. In the computer program area, I see the Berne Convention as a very important link to international computer program protection, just as it is for other copyrightable subject matter. It would be very difficult to negotiate similar international agreements for reciprocal rights on a new U.S. law. I suggest the United States should continue to rely on copyright protection for computer programs, so the Berne Convention can be utilized for international protection. This approach is the trend in most countries.

Professor Reichman has supported his proposal for a separate system by concluding that copyright subject matter protection of computer programs is too broad and anti-competitive. He illustrates this point by reference to design protection law, because the same general approach to protection of functional features may be used for copyright computer program protection.

In United States design patent law, for example, a product appearance can be protected for a design that has functional features integrally associated with it, if there are many other ways to create an appearance for a product using that function. It is a competitive effect test that tries to determine if design protection would be equivalent to utility patent protection. If it is, there is no design protection.

Professor Reichman is correct that for computer programs, copyright law will protect functional features. He recommends a separate system for computer program protection because this protection may be too broad, reducing competition in computer program development.

I do not think it is necessary to go to a separate system to protect computer programs due to the copyright protection of function-

al features. In fact, I suggest that the approach used in design law, for example, the United States design patent law, is the same one that should be applied to copyright computer program protection.

My research suggests that in the design protection law the presence of functional features is not a major problem. Almost all countries I have studied, including the United States design patent and federal trademark law, have adopted the test that a design feature dictated solely by function cannot be protected. If a functional feature is necessary for marketing a product, because there are no other appearance forms that can be used to compete effectively, the design law will exclude protection of that appearance.

The same analysis used for U.S. design patent law, for example, is the proper test to be applied under the U.S. copyright law, to determine what subject matter should be protected. It offers a sound approach which is a well recognized way to create the proper balance between competition and intellectual property rights for functional features.

AUDIENCE MEMBER: I just wanted to ask Mr. Griffiths to explain why a regulation was chosen as the methodology with respect to designs but not with respect to trademarks and patents? What under Community law gives rise to the possibility of addressing the problem in that way?

MR. GRIFFITHS: With regard to trademarks, they are using a Regulation for a Community trademark and a Directive for harmonization of the different national laws.

For patents, the situation is rather different. This predates my time at the Commission and, indeed, in the U.K. administration of intellectual property policy. But I think the European Patent Office and the European Patent Convention predated in its effect what the Commission was able to achieve. The Commission is now taking a very active interest in the Community Patent Convention, which is a different matter.

But as to why a Regulation was not used in the area of patents, it was necessary for historical reasons to use a Convention. I see that there is somebody who might have more to say about the subject.

DR. VERSTRYNGE: The answer to the question is that when we started the patent harmonization work, which was in the late 1960s, the United Kingdom was not a Member of the EC. So if we had chosen to bring it inside Community law at the time, it would have left the United Kingdom out. That was when—1967, '68, '69, somewhere in there—we chose a Convention. It has proven to be a very bad choice because it is very inflexible. And now, more than twenty years later, the Convention is still unratified. I don't think we would make that choice again.

MR. RICHARDS: I would just make one point. Hugh Griffiths talked about the U.K. unregistered design right. I would just make the observation that this is a reciprocity-based protection, which we heard about yesterday in terms of discussion on GATT. This protection under the U.K. unregistered right is generally restricted to EC nationals and nationals of countries granting reciprocal rights.