

Rules to Live By: The Ninth Circuit's Decision in *Sony v. Connectix*
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As technology has become more pervasive, law makers have felt increasing pressure from certain industries and segments of the public to impose new regulations in an effort to limit technology's perceived harmful affects. The danger with these new regulations is that they may be overly-broad and may have the unintended consequence of frustrating the growth of useful technologies. To avoid this result, law makers would be well advised to follow the example of the U.S. Court of Appeals for the 9th Circuit in its recent decision in *Sony v. Connectix*.¹

The case concerned Connectix's development of software which emulated the Sony PlayStation. This emulator enabled a user to run a PlayStation-compatible game on a Macintosh computer. To ensure compatibility between the emulator and the PlayStation games, Connectix had to reverse engineer the Sony PlayStation. (In *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974), the Supreme Court defined reverse engineering as "staerting with the known product and working backward to devine theprocess which aided in its development or manufacture.") One step of the reverse engineering process involved loading the PlayStation's basic input/output system (BIOS) into a computer and running it repeatedly as Connectix engineers developed software which interacted with the BIOS. Once they completed this software, the Connectix engineers developed their own BIOS to interact with the software.

The repeated running of the BIOS caused the making of numerous temporary copies of the BIOS in the computer's random access memory (RAM). Sony asserted that these copies infringed its copyright in the BIOS. Relying on the Ninth Circuit's decision in *Sega Enters., Ltd., v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), Connectix responded that these temporary copies were excused under the fair use doctrine because they were necessary for the uncovering of elements unprotected by Sony's copyright, i.e., the BIOS's interface specifications. Sony countered by arguing that Connectix could have avoided making the RAM copies of the BIOS had it followed a different development process. Connectix could have developed its own BIOS at the beginning, and used that BIOS in the development of the interoperable software, rather than use the Sony BIOS in the development of the interoperable software, and then develop its own BIOS.

The court rejected Sony's argument out of hand:

Even if we were inclined to supervise the engineering solutions of software companies in minute detail, and we are not, our application of the copyright law would not turn on such a distinction....[T]he rule urged by Sony would require that a software engineer, faced with two engineering solutions that each require intermediate copying of protected and unprotected material, often follow the least efficient solution.....This is

¹ *Sony Computer Entertainment, Inc. v. Connectix Corp.*, Case No. 99-15852, 2000 U.S. App. LEXIS 1744 (9th Cir. Feb. 10, 2000).

precisely the kind of 'wasted effort that the proscription against the copyright of ideas and facts ...[i]s designed to prevent.'

Sony, 2000 U.S. App., LEXIS 1744, at *24 (citations omitted).

The court further observed that:

[s]uch an approach would erect an artificial hurdle in the way of the public's access to the ideas contained within copyrighted software programs. We decline to erect such a barrier in this case. If Sony wishes to obtain a lawful monopoly in the functional concepts in its software, it must satisfy the more stringent standards of the patent laws.

Id. at *24-25.

In short, the Ninth Circuit refused to supervise the engineering solutions of software companies in minute detail. It declined to force engineers to follow inefficient procedures. Instead, the court focused on the big picture -- what Connectix was trying to do, and how that comported with the objectives of the copyright law.

Taken to an even higher level of generality, the court seems to be saying that we should not be concerned with the process, but with the end-result (unless, of course, a process patent is at involved). In other words, our laws should not restrict intermediate steps or products. Instead, our laws should prohibit only finished products that infringe intellectual property rights, or the harmful use of noninfringing products (e.g., using a personal computer to upload infringing material onto the Internet).

Unfortunately, Congress did not follow this approach in the 1998 Digital Millennium Copyright Act (DMCA), with baleful results. As the recent digital versatile disc (DVD) cases² show, strict application of the DMCA's anticircumvention provisions appear to inhibit the development of a Linux-compatible DVD drive. This is because the DMCA prohibits technologies which circumvent measures designed to prevent unauthorized access to or reproduction of copyrighted works, *even if the technologies have a substantial non-infringing use*. A Linux compatible DVD drive could be used, for example, to play a lawfully purchased DVD on a computer with a Linux operating system.³

By inhibiting the development of Linux compatible DVD drives, the DMCA hinders the ability of Linux to compete with Microsoft Windows; Linux can emerge as a significant competitor to Windows only if it offers all the functionality of Windows. Surely Congress did not intend this result when it enacted the DMCA. But such unintended

² *Universal City Studios, Inc., v. Reimerdes*, Case No. 00-277 (S.D.N.Y. filed Jan. 14, 2000); *DVD Copy Control Ass'n Inc., v. McLaughlin*, Case No. CV-786804 (Cal. Super. Ct. filed Dec. 27, 1999).

³ It appears that the DVD consortium recently granted a license for the development of a Linux-compatible DVD drive. While this, of course, is a positive development, the ability to develop interoperable products should not depend on the willingness of a platform vendor to permit the interoperability. A company should not be granted the legal power to determine the terms under which other firms may compete against it.

consequences occur when the law focuses on intermediate steps -- for example, circumvention and circumvention technologies -- rather than the end result.

As they embark on further regulation of technology, law makers should keep in mind this lesson of Sony v. Connectix.