

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Draft of August 8, 2008

MEMORANDUM FOR DEBIAN.

Re: Copyright issues in thumbnails images of video games

1. *Introduction*

You have asked us to provide legal guidance with respect to the copyrightability of thumbnail images of video game screenshots and in what manner these thumbnails can be distributed by Debian. The analysis below is based solely on U.S. law. Under another jurisdiction the analysis may differ significantly. Consequently, the assessment contained in this Memorandum may need to be developed and clarified in light of additional materials, information and explanations.

2. *Copyrightability of Video Game Screen Shots*

The two basic tests for eligibility for copyright protection are originality and fixation in tangible form. In general, games, or more accurately the ideas behind the games, are not eligible for copyright protection. Copyright does protect, however, various modes of expression of the idea of a game such as the pattern of the game board or the instruction manual to a game. To qualify for copyright protection, a work must be independently created by the author (i.e. “original”) and possess at least some minimal degree of creativity. The fixation requirement is

satisfied when the work of authorship is recorded on some physical medium capable of being perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

As a piece of software, the code underlying a video game is copyrightable. In addition, the display of images on a video game screen can also be separately copyrightable as a visual work. The author of the software is also the author of the visual representation of the game since it is the author's instructions that create the image. Thus, the reproduction of a screenshot copy of a video game display could constitute infringement of that work notwithstanding the fact that the game's actual software code has not been copied.

Arguments that go against this conclusion can be based in the originality requirement and on the fluid and fleeting nature of video game images. For example, it can be argued that copyright solely attaches to the code and not any derivative works that are purportedly created by that code such as a screen shot image. Others may argue that the images produced by the game code and the interactions with the players are not "fixed" or, alternatively, that the players of the video game are the authors of the images. Therefore the images created by a video game program are either not eligible for copyright protection because they are not "fixed" in a tangible medium or the images are authored by someone other than owner of the copyright in the underlying code. All of these arguments, however, have been rejected and copyright in the display of a video game is generally recognized as a separate copyright apart from the underlying code. We note, however, that the issue of authorship of the resulting image is fact dependant and involves inquiry into the nature of the game and the player's ability to control the resulting image. For example, a video game may contain elements of an image creation utility such as Paint or Photoshop that would allow a player to manipulate images to such a degree that the

player himself could claim a significant portion, if not all, of the authorship of the image. However, a court has found that in the typical video game context the player's ability to control the image is more akin to "changing channels on a television than its like writing a novel or painting a picture."

A thumbnail is a copy of an image; albeit often a degraded copy. As such, it is a work derived from the original image. In most cases the only manipulation performed on the image in creating the thumbnail is a reduction in the image's resolution and often some modification in the proportional height and width of the image. This level of manipulation is usually driven by practical concerns and dictated by functional considerations. It is, therefore, not likely to be considered a creative expression on the part of the person creating the thumbnail. In the typical case, then, there would be no copyright in the thumbnail image separate from the copyright in the original, full-scale image. The author of the original image, as the sole owner of copyright, can therefore decide whether or not to create, or permit others to create, thumbnail images. If unauthorized, a thumbnail image is an unauthorized work that violates the rights of the author of the original image. In cases involving copyright in thumbnails images that have reached the U.S. Federal Circuit, there has been little doubt that the creation, publication, display or distribution of thumbnails of copyrighted images of video game screenshots is also infringement.

Since the question of whether there is infringement in most cases is not at issue, the major court decisions on thumbnail images usually center on the fair use exception. We understand that Debian generally cannot rely on fair use to allow it to offer the thumbnail images. Nevertheless, it still may be helpful to review the current law on the subject.

3. Fair Use

The fair use exception to copyright protection is codified in Section 107 of the Copyright Act of 1976 (17 U.S.C. § 107), which provides that the “fair use” of copyrighted material is not infringement and provides the four factors that a court must weigh in a determination whether a particular use is “fair.” The factors are i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, ii) the nature of the copyrighted work, iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and iv) the effect of the use upon the potential market for or value of the copyrighted work.

In *Sony Computer Entertainment v. Bleem* (2000) the court found that use of screenshot images by the creator of a PC-based emulator of Sony console video games in advertising, while constituting infringement, was fair use because of the transformative nature of the use of the images to compare between versions of games. In *Kelly v. Arriba Soft Corp* (2002), the court found that although defendant Arriba conceded that the thumbnails were infringing, the use of the thumbnails as part of thousands of images from other sources within the context of a search engine database was a transformative use. After balancing the transformative nature of Arriba’s use of the thumbnails with the other traditional factors weighed in a fair use analysis, the court found that such use fell under the fair use exception.

And most recently in *Perfect 10 v. Amazon.com Inc.* (2007), the Court of Appeals concluded that even though there is a commercial market available for thumbnail images for use for cell phones and other small displays, the use of the plaintiff’s images for commercial purposes by Google and Amazon.com was likely fair use. The court’s decision was founded on the conclusion that the transformative nature of the use of the thumbnail images within the context of a search database offering a functionality apart from the originally intended uses of

the images far outweighed the competitive effects on of Perfect 10's plans to sell thumbnail images to a third parties.

We understand that Debian intends the thumbnails to be used in tandem with descriptions of the games within an application that describes what games are available to be used on the operating system. The use of the thumbnails in the games-thumbnails package is most likely fair use as the use of the thumbnail images in this context is analogous to the search functionality employed in both *Kelly* and *Perfect 10* and the use in advertising used by the defendant in *Bleem*. However, this protection may not extend to other users and developers that may choose to employ the images for other infringing uses that may fall outside the fair use exception. Debian will, thus, not be able to distribute the thumbnails images under a "free" license which would have allowed downstream developers to use the thumbnails for any purpose.

4. Conclusion

Given the potential of infringing acts by a downstream user of the thumbnails distributed by Debian, we recommend that Debian distribute the images under the same license under which it distributes the underlying game code.

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