

## Source code wars: The Role of Source Code in Copyright Infringement of Software

**Solut Technology Limited v Safaricom Limited (Civil Case E352 of 2019) [2024] KEHC 11002 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)**

### Introduction

The High Court in *Solut Technology Limited v Safaricom Limited* examined the concept of fixation in software as a literary work and highlighted the role of source code as the primary evidence in cases of copyright infringement involving software.

### Summary of facts

Solut Technology Limited (‘the Plaintiff’) sued Safaricom (‘the Defendant’) for alleged copyright infringement of its “Wavu” application. The Plaintiff submitted the software *via* the Defendant’s online portal for external developers, seeking to partner with the Defendant. After evaluating the submission, the Defendant rejected it. The Plaintiff later claimed that the Defendant used the submission to develop and launch a similar software known as “Thibitisha”.

### Decision

The court dismissed the suit against the Defendant, emphasizing that, in the context of software, the expression of ideas is embodied in the source code. The court further interpreted that, for literary works to qualify for copyright protection, they must be written down, recorded, or otherwise reduced to a material form. In the case of computer software, a concept note in its original form does not meet this requirement unless it is incorporated into a medium that a computer

can directly read and execute to perform specific tasks or achieve particular results. This transformation is crucial, as it converts the concept into an executable format, thereby meeting the threshold for copyright protection.

In this case, the Plaintiff had not disclosed the source code (the tangible expression of the work) to the Defendant. As a result, the court was unable to assess copyright infringement, as it could not evaluate the alleged literal similarities or the structural and design features claimed to have been copied by the Defendant.

### Conclusion

The source code is the backbone of computer software, it represents the developer’s creative ideas and innovation in physical form. It is not only a critical asset but also the most vulnerable to theft, unauthorized use or replication by competitors. The court has reinforced its importance by affirming that source code constitutes the primary evidence in determining copyright infringement in software cases. This decision underscores the necessity of protecting source code to safeguard intellectual property rights and foster innovation within the software development industry.



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