LEGAL PROTECTION OF COPYRIGHT FOR COMPUTER PROGRAMS

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Abstract

This article referes to the evolution of EEC's reglementation of software judicial protection and its interpretation of the European Court of Justice. The conclusion is that the European judicial system is more precupied to develop a system of interoperability that will steer Europe towards the users interests as well as the economic interests of the market and nearly negligent towards the interests of the authors although it recognizes the moral rights and patrimonial rights which can be used in the limited framework which will permit a better understanding of the value of its creators through interoperability.

Keywords: *Copyright, software, international legislation, legal rights, interoperability.*

1. Introduction

In a society in which creativity is undermined by the use of technology we need to recognize, respect and render homage to the human inventiveness among all computer programs which without would be difficult to imagine a social, professional and even affective normal existence.

In Europe, the necessity to promote the software industry has drawn attention on the lack of harmonization in between the different member state legislations on authors laws regarding the protection of the authors of software programs. In addition, the economic pressures have stimulated the development of legislation in that domain which resulted a first document which regulates these matters with two principal scopes: harmonizing the legislation and the establishment of interoperability.

2.Content

The preoccupation to regulate judicially the author protections for software programs have manifested themselves in a first legislative plan to be implemented by the Directive 91/250/EEC, although before the release of this act the countries national jurisprudence of software authors expressed different opinions on the legal nature of this specific type of creation and the form and extent of legal protection.

Directive no. 92/250/EEC was based on the premises conferring a unitary legal framework for the protection of the computer programs which in a first stage to be limited to establish that member states to agree to offer protection under copyright of computer programs as works of literary works conform protection of literary and artistic works as described in the convention of Bern and further more to establish the beneficiaries and the object of protection, exclusive rights on which protected persons may claim, to authorize or prohibit certain acts and the duration of protection.

In order to develop prolific computer programs and their use in all areas of activities, the European Community has considered it appropriate to legislative intercede in order to ensure a fair, correct, competitive framework which regulates the domain in which human investment, technical and important financials converge towards the realization of products with an important economic value which has become a fundamental resource for the industrial development of the Community.

The first document reflects the preoccupation for informatics, directive 92/250/1991 proposes a definition of "computer program" which "*shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage*".

For the first time, and unlike the US copyright system, the Directive 250/1991 is supported at the legislative level and argued international standardization for the software development and promoted principals of market competition and compatibility of computer programs, is authorized and regulated compilation operations and conditions under which this could be an exception of copyright protection and at the same time a promoter of progress.

The principal of protecting the rights of the author under copyright is placed prior the interoperability arrangement of software products and their interfaces with hardware and other software components of the system thus creating an exclusive compatibility dichotomy dedicated and adaptable to the effects on the software market demonstrated obviously today.

The Directive states that the law does not intend to protect ideas or principles on which the

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software program is based but merely the expression of it, allowing another person to try and find a way similar to that (identical).

The Directive balances the copy writer of a computer program for it to allow coping or modifying its wrights against the author or to obtain necessary information to achieve interoperability of a computer program independently created under certain conditions.

Interoperability has been defined in the following terms "(*function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction to enable all elements of software and hardware to work with other software and hardware and with users. Parts of the program which provide interconnection and interaction between elements of software and hardware are generally known as 'interfaces'; functional interconnection and interaction is generally known as "interoperability"; such interoperability can be defined as the ability to exchange information and mutually to use the information exchanged. only the expression of a computer program is protected and that ideas and principles which underlie the various elements of a program, including those on which underlie its interfaces, are not protected by copyright under this Directive*)"[1].

The European Court of Justice was called upon to determine whether the graphic user interfaces (GUI) of a computer program is a form of expression of that program within the meaning of art 1 (2) of the directive 91/250/EEC and weather they have therefore copyrights protection of computer programs, as reflected in this Directive on the occasion of the case Bezpecnostnii softwarova asociace- Svaz softwarove ochrany vs Ministry of Culture of the Czech Republic (C-393/09).The Court found that the Directive 92/250/EEC does not define the term "any form of expression of a computer program" and as such the phrase must be defined considering the text and the context in which they appear according to art 1 paragraph 2 of the Directive 92/250 which will be interpreted according to the Directives objectives as a whole and in accordance with international law.

According to art 1 paragraph 1 of the Directive 91/250, computer programs are protected by copyright as literary works within the meaning the Bern Convention. The second paragraph of that article extends such protection to all forms of expression of a computer program. The first sentence the seventh consideration of the Directive no. 91/250 states that for the purpose of this directive the notion of a software program includes programs in any form, including those which are incorporated in the hardware. On the other hand, paragraph one of the TRIPS Agreement which states that computer programs weather expressed in source code or in object code, will be protected as literary works under the Bern Convention. Given these legal terms of the European Court of Justice concluded that the source code and abject of the computer programs are forms of expression which require to be protected by copyright in computer programs under the article 1 paragraph 2 of the Directive 91/250. Therefore, the protective scope of this Directive referrers to all forms of expressions of the software allowing its reproduction in different computer languages, such us source code and object code. The seventh consideration of the directive no 91/250 includes that the concept of the computer program also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

As such, any form of expression of a computer program has to be protected from the moment when its reproduction would entail reproduction of the computer program itself thus enabling the computer to perform its function.

Consideration ten and eleven of the Directive 91/250, interfaces are part of the computer program which provide which ensure interconnection and interaction of all the elements of the software and hardware with other software and hardware and with users in order to allow them to function. in essence the graphical user interface is an interaction interface which enables communications between the computer program and the user. In those circumstances, the graphic user interface does not allow reproduction of the computer program, but constitutes only one element of this program through which user exploit the functionality of this program, hands this interface is not a form of expression of a computer program within the meaning of article 1 paragraph 2 of the Directive 91/250 and therefore cannot benefit from the specific protection of copyright in computer programs under the terms of the Directive[2].

In view of the rules of the judicial protection as the recognized author of computer programs, the Directive prohibits the permanent or temporary reproduction, translation, adaptation, arrangement, transformation of the program as well as any form of public distribution, including the original or copies of the program[3], regulating specific exceptions of prohibited actions, or necessary documents of the

[1] Directive of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (91/250/EEC).

[2] Bezpecnostnii softwarova asociace - Svaz softwarove ochrany vs Ministry of Culture of Czech Republic (C-393/09).

[3] Art. 4 Directive 91/250 EEC.

prohibited actions such as: in the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction, the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use, the person having a right to use a copy of a computer program shall be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do[4].

The provisions of the Directive require member states to institute measures to remedy the damage suffered by the author of the software when they are cause by any act of putting into circulation a copy of a computer program while knowing or need to have known that it is an illegal copy; possession for commercial purposes of a copy of a computer program of which the only scope is to facilitate the removal or bypassing any technical means of protection of a software program and requires the national legislations to regulate and adopt specific sanctions for the illicit actions.

The European document does, as the United States Code, makes a difference in between the rental (available for another person for a limited period of time in order to achieve profit a program or a copy of it) and the public landing (offering by a non-profit organization a computer program on which that person has copyright or legal rights to use or to copy for use by a person of another nonprofit organization).

The Directive 91/250/EEC has undergone a number of clarifications. Directive 96/9/EEC of the EUROPEAN Parliament and of the Council d.d.11.03.2006 gives legal protection to the data basis defined as a "collection of works, data or other independent elements arranged in a systematic or methodical individually assed by means of electronic or other means. "The Directive provides the protection of data basis both through copyright for intellectual creation, and by *sui generis* protection right (of the financial, human resources, input and energy investment) in order to obtain verify and or present the content of the data basis. However, section 23 of the explanatory memorandum directive states that since the term "data base" should not apply to computer programs used for the creation or operation o0f a data base, these computer programs are protected by Directive 91/250 /EEC of May 14 1991 on the legal protection of the legal programs.

An important amendment to the regulation length of copyright regulations of computer programs was introduced by Directive 93/98/EEC of the 29th of October 1993 harmonizing the terms of protection of copyright and certain related rights. The document aims to ensure a Unitarian format and uniform in order to eliminate inconsistencies between national laws governing the terms of protection of copyrights and related rights, which are liable to impede the free movement of goods and freedom to provide services and to obstruct competition in the common market so that it is necessary to ensure the proper function of the internal market harmonizing national laws so that the terms of protection are identical throughout the community.

The evolution and promotion an effervescent and competitive market was reflected in the amendment to the terms of protection of the creation of software with regard to the vision of the European Community. If initially the software was recognized in the same legal régime as literary was under the Bern Convention (lifetime of the author plus fifty years after his/her death , calculating of the first day of January of the next year after the realization of the mentioned creation with the possibility for the member states to recognize according to their national legislation which might provide for a longer period of copyright protection in order to maintain this period of harmonization of communities), article 1 paragraph 1 of the Directive 93/93/EEC the protection terms was extended (copyright in a literally or artistic work within the meaning of article 2 of the Bern Convention over the entire lifetime of the author and 70 years after his death irrespective of the date when was lawfully made available to the public).

The provisos on protection on computer programs had been addressed by legislative and directive 2001/29/CE on the harmonization of certain aspects of copyrights and related rights in the IT word.

The preamble of This Directive states that the harmonized legal protection regulated by this act shall not affect the specific provision on protection of the Directive 91/250/EEC and in particular, should not apply to the protection of technological measures used in computer programs, which is exclusively addressed in that directive and should not obstruct nor prevent the development or use of any means of circumventing a measure of technology to enable the deployment of actions according to art 5 paragraph 3 or art 3 of the directive 91/250/EEC. Article 5 and 6 of the directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

[4] Art. 5 Directive 91/250 EEC.

Referring to the applicable domain, the directive leaves the community provisions intact on the legal protection of software programs however introduces notions and principles necessary for copyright protection of software.

This directive is followed by the adoption, in December 19996 by the Word Intellectual Property Organization of new treaties: the WIPO Copyright Treaties (WCT) and the WIPO Treaty on Public Performances and Phonograms.

Even if those two treaties do not explicitly target new directions and do not legislate explicit material on the protection of copyright in the field of computer programs, their adoption together with the explanatory statement content in the preamble of, the Directive 91/250/EEC represents recognition on the level of legislation of the spectacular evolution of the software market and provide specific protection for the authors. The Directive

Recognizes the social implications that reflect the development of informatics and brought visions of the phenomenal that it calls "digital agenda" and that states as a principal the requirement to improve the means to fight piracy worldwide. The Directive insists on the importance of the copyright "because e it stimulates the development of new products and services as well as the creation and exploitation of their creative content" and therefore its protection will "foster substantial investment in creativity and innovation including network infrastructure and will lead to growth and increased competitiveness into European industry both in its content and IT and, on a more general level, a range of divers industrial and cultural sections, providing new jobs and increased in short existing working places"[5].

In the context of the investigation on national legislation which tend to create differences which abstract the free flow of intellectual creations and in particular it's products enforce the idea of protection of intellectual property rights as part of ownership.

The Directive also referees to the services market "on demand" in the field of protection the copyrights which they define as those services requested and received by the recipient at the time and location he desired, which might be different of the time and location offering them to the public by the copyright holder in this domain, which might be included those services or products that can be accessed, run, viewed, downloaded via a computer network. The notion refers today to those complex computer programs which were adopted by the developer (or implementation) to the specific needs of the customer involving most often to be used for an infrastructure developer through a computer network. The Directive excludes expiry of exclusive rights of the copyright holder regarding the distribution of services and in particular online services. Therefore the Directive establishes that the right holder copyright for such services will have to give authorization for distribution of each act (each individual section) in part[6].

The preamble to the Directive states that uses of the license as a way to assign the right to use the software has the character of subsidiary regarding national regulations on extended collative licenses. The Directive also establishes that the rights refer to a likely to be transferred, assigned or licensed, subjects of a conventional subsidiary, maintaining the directive within the legislation of the member states.

Also, the Directive 91/2001 establishes the principle that "the mere rendering of physical facilities to make or making a communication does not mean, by itself, communication within the meaning given by the Directive"[7]. This principle has special significance given that in the absence of a specific statement to the contrary that might give the assumption that providing a space where different users can communicate and exchange files between them will not entail a liability on the part of just offering the space (issue of exchange of peer to peer system).

The Directive 2001 supplements the provisions of the Directive of 1999 with regard to the reproduction of article 2 of the Directive from 2001 which defends the exclusive right of the author of the work to authorize or prohibit "direct or indirect temporary or permanent reproduction by any means or and any form whole or in part"[8] . Article thereof the Directive from 2001 provides that it protects the authors exclusive right to authorize or prohibit any communication to the public as well as enabling communication to the public of their works, by wire or wireless technology including in a manner that the recipients can chose the time and location they chose to be notified of. Furthermore, a first communication to the public or the offer of first communication to the public does not consume this exclusive right.

The Directive no. 98/EEC 2009 amends the legal protection of copyright of computer programs expressing an objective position o0n the criteria of originality and subject protection.

[5] Directive 2001/29 of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, document nr. 32001L0029, parag. (3) și (4).

[6] Daniela Marin, *Protecția programelor de calculator în Uniunea Europeană,* http://www.proceedings.univ-danubius.ro/index.php/eirp/article/ viewFile/1065/984.

[7] Directive 2001/29/CE of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, document nr. 32001L0029, parag. (27).

[8] Directive 2001/29/CE of The European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, document nr. 32001L0029, art. 2 (a).

The document specifies an objective criteria of the previous definition given by the directive 91/250/EEC namely that the appreciation of originality and susceptible element of protection should not cover an assessment of the quality nor a static merits of the program.

The European Court of Justice established in the interpretation of article 1 paragraph 2 of Directive no. 24/2009 in light of point eight of the preamble that the graphic user interface of a computer program may qualify for protection bay copyright under common-law Directive no. 2001/29. The Court stated that copyright within the meaning of Directive 2001/29 cannot be applied unless a work is original, it is the authors own intellectual creation, therefore the graphical user interface can also benefit from the work of protection by copyright if the author own intellectual creation and its essential criteria establishing this criterion are specific arrangements or configurations of all components of the graphic user interface to determine which meet the condition of originality that cannot be achieved by the graphic user interface components that would characterize only by their technical function. If the expression of those components is dictated by their technical function, the criterion of originality is not met since the different ways of implementing an idea are so limited that the idea and its expression is confused. However such an interface can benefit from copyright protection as a work entitled under directive 2001/29 when that interface its author intellectual creation.[9]

It thus stressed the special character of the concept of creativity in the field of software and hands on how special copyright protection involving substantial limitation derived from the right to use the licensed holders standard.

Pursuant to section fifteen of the explanatory memorandum directive "reproduction, translation, adaptation or transformation of the form of the code was a copy of a computer program constitutes an infringement of the exclusive rights of the author. In certain circumstances, reproduction of the code of a computer program or a translation of its form are indispensable in order to obtain the necessary interoperability information of a program created independently from other programs. Bear in mind that only in these limited circumstances performance of the acts of reproduction and translation by or behalf of a person having the right to use a copy of the program is legitimate and compatible with fare practice and is therefore considered not necessary to obtain authorization from the copyright owner. One objective of this exception is to allow to connect all components of the computer system, including those of different manufactures so that they can work together. Such an exception to the authors exclusive rights may not be applied so as to prejudice the legitimate interests of the right holder or a normal exploitation of the program.

So, logic, algorithms and programs in languages that are behind a component (or all) software is not covered by that prevision of the Council, the expression of those ideas and principals is a matter for copyright as is required by the laws of the member states.

Perception about the element of novelty, the subject of creativity and therefore subject matter of protection of copyright software is reflected in the recent practice of the of court that the decision in case SAS [C- *406/10*] shows that in accordance with directive 91/250/EEC only the expression of a computer program is protected by copyright, however, the ideas and principles underling logic algorithms and program languages are not protected by the Directive. The court emphasizes that neither the functionality of a computer program not the programming language and the format of data files used in a computer program to exploit certain functions does not constitute a form of expression of that program within the meaning of art 1 paragraph 2 of the Directive 91/2250 EEC.

The protective scope of the Directive 91/250 targeting the software in all its forms of expression such as source code and object code and its enabling reproduction in different computer languages. By the same judgment, the European court of European Union ruled that the graphic users interface does not allow reproduction of the computer program, but constitutes only one element of this program through which users exploit the functionality if the program. In conclusions, the Court Justice of European Union has determined that neither the functionality of a computer program nor the program in language or format of data files used in a program to exploit certain functions of it will not constitute a form of expression of the program and are not protected by copyright in computer programs according to directive 91/250.

However, with regard to the language and the format of data files they can still qualify as works of copyright protection under directive 2009/29 EEC regarding on the harmonization on certain aspect of copyright and related rights in the information world, as if the creation is the authors own intellectual creation.

By the same decision, the court expressed its interpretation of article five paragraph three of the directive 91/250 that in case a person has obtained a copy of a licensed computer program may, without the authorization of the copyright holder of this program analyze, study or test the functionality of the program in order to determine the ideas and principles underline , based on any element of the

[9] Bezpecnostnii softwarova asociace - Svaz softwarove ochrany vs Ministry of Culure of the Czech Republic (C-393/09).

program when performing acts covered by this license, a purpose that goes beyond the framework of this, the owner of the computer program cannot prevent, by invoking the license agreement the person who obtained a license to identify ideas and principles which underline any element of a computer program when it (i) carries out acts the license allows to perform and acts of loading and running necessary for the use of the computer program and (ii) does not infringe the exclusive rights of the holder of the program . Decision argues that it cannot infringe copyright in the computer program when the acquiring of the legal license was limited to analysis , study and test the computer program by the licensee to reproduce its functionality and did not have access to the source code thereof.[10]

Article two, letter e of the Directive 2009/29 recognizes the exclusive rights of authors with regard to their works to authorize or prohibit. In connection with this provision the Justice Court of the EEC had to establish whether the reproduction in a computer program or a user manual of this manual of certain elements described in the user manual pc protected by copyright constitutes a copyright infringement on the letter manual. According to previous jurisprudence of the European Union the various part of a work enjoy protection under directive 2001/29 provided that they contain elements which are the expression of the intellectual creation of the author of this work. In this case, the key words, syntax, commands and combination of commands options, defaults and iterations consisting of words, figures of mathematical concept which, taking separately, are not in themselves an intellectual creation of the author of the computer program.

3. Conclusions

The way that the protection of the author rights was legalized is very specific due to the fact that an explosion of such products (stimulated by the urge of using these creations in all domains) and due to the short lifespan of such products and special character as well as the innovation in the creation of the software product.

Observe that protection by way of copyright and the protection by way of Bern Convention are based on different values of protection. It appears that the system of interoperability will steer Europe towards the users interests as well as the economic interests of the market a nearly negligent towards the interests of the authors although it recognizes the moral rights and patrimonial rights which can be used in the limited framework which will permit a better understanding of the value of its creators through interoperability.

This is why the legal measures in place in the European Community are rather orientated on the basis of repairing measures on eventual prejudice rather than a sure and precise way to block the illegal commercialization of these creations.

By default, the author of the software is limited in his/she s prerogatives to take legal actions against uses who explicitly use the creation against the authors interest but not against any acts of the legitimate use that are focused on watching normal use of the program or a copy of it, debugging program, observing, studying and testing the functionalities or reproduction and translation software code to achieve interoperability with other software.

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[10] **SAS Institute Inc./World Programming Ltd (**C–406/10).