# "Copyright protection of Computer Software"

and

# "Liability of Internet Intermediaries“

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# Copyright protection of computer software

Recent case law

# The legal framework

- Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
  - First harmonization initiative for copyright
  - "*Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject*" (rec. 4)
  - Amended by Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights
    - Term : 50 years post mortem → 70 years post mortem
  - Implementation report in 2000 (COM(2000) 199 final) : no need for further action

# The legal framework

- Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs
- Belgian Act of 30 June 1994 (M.B., 27 juillet 1994)
- Sanctions modified by Act of 15 May 2007 (Directive 2004/48/EC - Enforcement)

# Principles & recent cases

- Computer programs protected as literary works
- What is a computer program and what is the condition for protection ?
  - CJEU 22 December 2010
- Who owns the rights ?
  - Cass 3 June 2010
- What are the acts requiring authorization ?
  - General Court, 16 December 2010
- What are the acts not requiring an authorization ?
  - Question referred to the CJEU on 11 august 2010 (C-406/10)

# Is a GUI protected as a computer program?

## CJEU 22 December 2010 (C-393/09, BSA)

FACTS :

- BSA, a Czech association, applied to the Czech Ministry of Culture to be appointed as “collective right society” for the administration of “graphic user interfaces”
- Refusal
- Multiple appeals
- Czech administrative supreme Court referred questions to the CJEU

# Is a GUI protected as a computer program?

CJEU 22 December 2010 (C-393/09, BSA)

Questions :

- Is a GUI an expression of a computer program ?
- Does the broadcasting of a GUI constitute a communication to the public ?

# Is a GUI protected as a computer program?

- Is a GUI an expression of a computer program ?
  - Article 1.2 of the Directive : "*Protection in accordance with this Directive shall apply to the expression in any form of a computer program*."
    - Article 10.1 TRIPS : "*Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)*."
    - Article 1.1. of the Directive : "*For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material.*" WHY ? Because "*the nature of the preparatory work is such that a computer program can result from it at a later stage" [para. 37]*
  - "*the graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program*" [para. 41]
  - → GUI is not protected by Directive 2009/24/EC

# Is a GUI protected as a computer program?

- Can a GUI still be protected by copyright ?
  - Although it was not asked to answer this question, the Court went on to answer whether a GIU may be protected as another work, under Directive 2001/29…
  - The answer is yes, if it is original in the sense that it is its author's own intellectual creation (see, *Infopaq*).
  - It will not be "original" if "*components of the graphic user interface are differentiated only by their technical function*".
  - → Computer program : no BUT work of authorship : maybe

# Is a GUI protected as a computer program?

- What are the consequences ?
  - For this case : mainly to define who owns the rights in case the computer program is created by an employee. (computer program → deemed assignment / GIU/Documentation → express or implied assignment)
  - More generally : none for us (or the French) but maybe for other Member States, such as UK
    - copyright protects a closed list of 8 works : original literary, dramatic, musical and artistic works; films; sound recordings; broadcasts and typographical arrangements of published editions.
    - In order to be protected a particular item of subject matter must fall within one of these boxes (as Jacob LJ has called them – Hyperion v Sawkins [2005] EWCA Civ 565, at [74]).
    - Being a “work of the mind” is traditionally not sufficient if the work does not fit in a boxes (Creation Records [1997] EMLR 444).

    → UK lawyers are uncertain whether the list of “works” must be interpreted to cover anything that is the author’s own intellectual creation

    → Call for a greater (express) harmonization

# Broadcasting of a GUI

- Is the broadcasting of a GUI a communication to the public ?
  - NO : viewers receive a communication of the GUI "*solely in a passive manner, without the possibility of intervening*".
  - They cannot have access to the essential element characterising the interface (its interaction with the user).
  - So, "*there is no communication to the public of the graphic user interface within the meaning of Article 3(1) of Directive 2001/29*"

# Broadcasting of a GUI

- What are the consequences ?
  - Strange because it could be argued that originality of a GUI could be found in other elements than its interaction with the users
  - Probably just to shut down BSA
  - In any case, this decision should be interpreted narrowly, as excluding communication to the public of “interfaces per se”…
  - but not individual elements of an interface (buttons, icons, etc…).

# Who owns the rights ?

Cass 3 June 2010 (C.09.0226, www.cass.be)

FACTS :

- DocToKeep : computer program assisting in archiving and retrieving critical information throughout his organisation
- Created by Mr. H who was the manager (“gérant”) of Area Productions sprl
- No agreement dealing with copyright between Mr. H en AP
- Area Productions goes bankrupt
- Receiver sells the software to

- Mr H claims that Dekimo infringes his copyrights

# Who owns the rights ?

- Decision of the Court of appeal in Gent (3 nov 2008)
- Mr H. can be considered as an employee or, at least, copyrights belong to the company :
  - Mr H did not create the software in its own name (or in its free time)
  - He created the software while working for the company
  - Software development is one of the purposes of the company
  - The software was part of the assets of the company, as mentioned in the company books…. prepared under the supervision of Mr H (as gérant)
  - In tempore non suspecto, Mr H had always behaved as if the company was the copyright owner
  - "*Mr H. cannot reasonably argue that he can get all the rights on the software, while the company supported all the charges*"

# Who owns the rights ?

- Decision of the Supreme Court
  - Mr H was neither an employee, nor an agent : no deemed assignement
    - "*Where a computer program is created by an **employee** [or an agent] in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract*" (art. 2.3 Directive / art. 3 Belgian Act)
  - Initial owner of the copyright was Mr H and not the company
    - The Belgian Copyright Act expressly states that the initial owner of the copyrights is the natural person creating the work (art. 6)

# Who owns the rights ?

- Lessons learned
  - Real issue for companies, like Bekimo, who intended to acquire the copyrights, paid a bankrupt company and received a claim from the author !
  - If you acquire software from a company :
    - Whenever the author (natural person) is not an employee (in the strict sense),
    - Require a written assignment from the natural person (ideally attached to the agreement with the company)

# When the European commission infringes…

- General Court, 16 December 2010, Case T-19/07, *Systran / European Commission*
- FACTS :
  - Systran owns a computer software for automated translation
  - It was created for the EC in 1975
  - Systran remains copyright owner
  - EC receives a limited license
  - Uses Systran to perform upgrades and maintenance
  - Then, in 2004, stops using Systran
  - Upgrades the software without Systran’s consent

# When the European commission infringes…

- After more than 60 pages of discussions, the GC grants to Systran :
  - 7 million euros in damages for lost royalties (between 2004-2010)
  - 5 million euros in damages for the negative impact of the Commission’s decision on the development of the company (i.e. 6% of the turnover in 2003 for 2004 to 2010)
  - 1000 euros in damages for the “moral” prejudice

# When the European commission infringes…

- Lessons learned :
  - If the EC infringes your copyright, you can initiate proceedings before the GC.
    - Based on Article 340 of the TFUE “In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”
    - And Article 268 TFE : “*The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.* “
  - Check that your license allows maintenance by a third party
  - Important precedent for quasi “mono-client” companies… as infringement may also lead to damages for the prejudice to the “development of the company”…

# What are the acts not requiring authorization ?

- Question referred to the CJEU on 11 august 2010 (C-406/10, *SAS Institute / World Programming*
  - Two pages of questions on the Software Directive
  - Very important issues :
    - ‘non-literal’ copying / copy of the functionalities
    - right to study the program
      - *5.3. The person having a right to use a copy of a computer program shall be entitled, without the authorisation 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.*
    - Interoperability (ability to read files created by the first software)
    - EXTREMELY IMPORTANT CASE (OPEN SOURCE)

# Liability of Internet Intermediaries

# Introduction

« Without Internet intermediaries, there is no Internet »

# Introduction

- « Mere conduit » : service that consists of the transmission of information in a communication network

# Introduction

- « Hosting » : the storage of information

# Introduction

- « Caching » : the automatic, intermediate and temporary storage of the information, performed for the sole purpose of making more efficient the information's onward transmission to recipients

# Introduction

- Two arguments to support the development of the Internet:
  - Fundamental rights perspective: "*welcoming the opportunities offered by the new information technologies to promote freedom of expression and information"* (Declaration of the Committee of Ministers of the Council of Europe in 1999)
  - Economic perspective : "*both citizens and business must have access to inexpensive, world-class communications infrastructure and a wide range of services and that realising Europe's full e-potential depended on creating the right conditions for e-commerce and the internet to flourish*" (Declaration of the European Council Council Lisbon 2000)

# The legal framework

- European law (47 Member States of the Council of Europe) :
  - Article 10 of the European Convention HR : "freedom to receive and impart information"
  - Case law of the Europan Court of Human Rights : this freedom relates not only to the content of the information, but also the means of transmitting and receiving it (ECHR Autronic AG v. Switzerland, no. 12726/87)
  - Soft law :
    - Declaration of 28 May 2003 of the Committee of Ministers on freedom of communication on the Internet.
    - Recommendation on measures to promote the respect for freedom of expression and information with regard to Internet filters, CM/Rec(2008)6.
    - Recommendation on self-regulation concerning cyber content, Rec(2001)8.
    - Declaration on human rights and the rule of law in the Information Society, CM(2005)56 final.
    - Recommendation on promoting freedom of expression and information in the new information and communications environment, CM/Rec(2007)11

# The legal framework

- European Union law :
  - Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), articles 12-15
  - First Report, 21 November 2003, COM(2003) 702 final.

# The legal framework

- Policy decision : since Internet intermediaries are necessary for the functioning of the Internet, let's protect their status
- Two prohibitions on the Member States :
  - The prohibition to hold an Internet intermediary liable for the information stored or transmitted **if** certain conditions are met (article 12-14 of the e-commerce Directive);
  - The prohibition to impose a general obligation on an Internet intermediary to monitor information or to seek facts or circumstances indicating the illegal nature thereof (article 15 of the e-commerce Directive).

# The legal framework

- Mere Conduit
- No liability if the provider:
  - (a) does not initiate the transmission;
  - (b) does not select the receiver of the transmission; and
  - (c) does not select or modify the information contained in the transmission.

# The legal framework

- Hosting
- No liability if the provider:
  - (a) does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
  - (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
- However, the exemption shall not apply when the recipient of the service is acting under the authority or the control of the provider.

# The legal framework

- Caching
- No liability if the provider:
  - (a) does not modify the information;
  - (b) complies with conditions on access to the information;
  - (c) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
  - (d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
  - (e) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

# The legal framework

- The exemption from liability applies to any potential liability (civil & criminal):
  - Intellectual property rights infringement
  - Illegal and harmful contents
  - Misrepresentation
  - Unfair commercial practices

# The issues before the ECJ

- What is a hosting provider ?

- What can a hosting or access provider be obliged to do to prevent IPR infringement ?

# The issues before the ECJ : status of hosting providers

- Cases C-236/08 to C-238/08 (Google France) :

- Google claims that it provides hosting services for the adwords posted on its site and reserved by advertisers based on keywords

# The issues before the ECJ : status of hosting providers

- The ECJ ruled that :
- It is irrelevant that :
  - Google’s service is subject to payment,
  - Google sets the payment terms,
  - Google provides general information to its clients
  - Google checks the concordance of the reserved keyword and the search term entered by an internet user.
- By contrast, the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant.

# The issues before the ECJ : status of hosting providers

- The ECJ ruled that :
- in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31,
- it is necessary to examine whether the role played by that service provider is **neutral**, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.

# The issues before the ECJ : status of hosting providers

- Very ambiguous and unclear statement
- Has already been applied by a French Court of Appeal in the LVMH & Dior / eBay case (3 September 2010)

  - eBay is NOT is “neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”
  - Because… it’s activity “supposes” that eBay makes sure that the goods are genuine.

# The issues before the ECJ : status of hosting providers

- In the meantime, the ECJ has already heard another eBay case (C-324/09) … in which eBay claims that it is a acting as an hosting provider

- The oral pleadings were mostly focused on discussing the Google decision and how it applies to eBay…
- The European Commission supported eBay
- The opinion of the AG was issued on 9 December 2010

# The issues before the ECJ : status of hosting providers

- Opinion of the AG Niilo Jääskinen :
  - Para 139 "*I have some difficulties with this interpretation.*" (ie the decision of the ECJ in the Google case)
  - Para 146 : "*As I have explained, 'neutrality' does not appear to be quite the right test under the directive for this question. Indeed, I would find it surreal that if eBay intervenes and guides the contents of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding storage of information uploaded by the users*"

→ eBay is a the hosting provider of the listings !

→ What will the Court say ?

# The issues before the ECJ : the scope of injunctions

- Article 11 of Directive 2004/48/EC provides that : "*Member States shall also ensure that rightholders are in a position to apply for an **injunction** against intermediaries whose services are used by a third party to infringe an intellectual property right*"
- If the « intermediary » is an Internet intermediary, how to combine such injunctions with
  - the ecommerce Directive (esp. Art. 15), and
  - the principle of freedom of expression ?
- Three cases are currently pending before the ECJ !

# The issues before the ECJ : the scope of injunctions

- Case C-324/09

- Question referred by the High Court of Justice :
  - does Article 11 of Directive 2004/484 require Member States to ensure that the trade mark proprietor can obtain an injunction against the intermediary
  - to prevent **<u>further</u>** infringements of the said trade mark,
  - as opposed to continuation of that **<u>specific</u>** act of infringement,
  - and if so what is the scope of the injunction that shall be made available ?

# The issues before the ECJ : the scope of injunctions

- Opinion of the AG Niilo Jääskinen :
  - Para 182 "*An appropriate limit for the scope of injunctions may be that of a double requirement of identity.*"
  - *Same infringing third party and same right infringed*

→ Easy for eBay : "*Such an injunction could be followed by an information society service provider by simply closing the client account of the user in question.*"

→ *So… No filtering ?*

- Para 181 "*What is crucial, of course, is that the intermediary can know with certainty what is required from him, and that the injunction does not impose impossible, disproportionate or illegal duties like a general obligation of monitoring*."

# The issues before the ECJ : the scope of injunctions

- Case C-70/10

- Question referred by the Brussels Court of Appeal
- Is a court allowed to impose an access service provider (“mere conduit”) to filter the transmissions ?

- Case C-360/10

- Question referred by the Brussels Court of First Instance
- Is a court allowed to impose a hosting provider to filter the content that it stores for its users ?

# The issues before the ECJ : the scope of injunctions

- 'Do Directives 2001/29 and 2004/48 (…), construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, permit Member States to authorise a national court to order
- a hosting service provider (Netlog) / an Internet Service Provider (Scarlet) to
- introduce, for all its customers, in abstracto and as a preventive measure,
- at its own cost and for an unlimited period,
- a system for filtering most of the information which is stored on its servers / transmits
- in order to identify on its servers electronic files containing [copyrighted works],
- and subsequently to block the exchange of such files?'

# The issues before the ECJ : the scope of injunctions

- “If the answer to the question in paragraph 1 is in the affirmative,
- do those directives require a national court,
- called upon to give a ruling on an application for an injunction against an intermediary whose services are used by a third party to infringe a copyright,
- to apply the **principle of proportionality** when deciding on the effectiveness and dissuasive effect of the measure sought?”

# Conclusion

- Last June, the e-commerce directive celebrated its 10th birthday
- It gave rise to countless decisions by national courts in most of the Member States
- The approaches followed by the courts have been extremely diverging
- At least on some questions, the end of the tunnel seems near…