Copyright protection of computer software

Recent case law

9 March 2012

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

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 ?
  - *GIU* : CJEU 22 December 2010, case BSA (C-393/09) -
  - *Clones:* Opinion of the AG Bot of 29 November 2011, case SAS (C-406/10) – (Question referred to the CJEU on 11 august 2010 (C-406/10)
- What are the acts not requiring an authorization ?
  - *Decompilation* Opinion of the AG Bot of 29 November 2011, case SAS (C-406/10) –(Question referred to the CJEU on 11 august 2010 (C-406/10)
  - *Exhaustion* : Question referred to the CJEU on 14 March 2011, case Oracle/usedsoftware (C-128/10)

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

- Is a GUI an expression of a computer program ?
- 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

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

- 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.*"
- → Because "*the nature of the preparatory work is such that a computer program can result from it at a later stage" [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 under Directive 2009/24/EC

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

- 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

Clone war

- CJEU, C-406/10,

  SAS Institute / World Programming

  - Two pages of questions on the Software Directive
  - Very important issues raised for the first time before the CJEU
  - CJEU has not yet decided
  - Analysis of the opinion of the Advocate General BOT (29/11/2011)

Clone war

- Facts 

  - SAS System is an integrated set of programs which enables users to carry out data processing and statistical analysis tasks
  - Base SAS : core component which enables users to write and run application programs to manipulate data.
  - Applications are written in SAS Language.
  - If a user wants to change system, it will have to re-write the applications.

Clone war

- Facts 

  - World Programming created World Programming System (WPS), which is an alternative to SAS System
  - WPS is able to run application programs written in SAS language, without the need to re-write them
  - WP’s intention was to create the same functionalities
  - Same input gives the same output
  - WPS had no access to the source code
  - WPS was written based on the study of an original copy and the users manual

Clone war

- Questions

  - Whether WPL could reproduce :
    - the functionalities,
    - the programming language
    - the formats of data files
    - the content of the user manual ?

Clone war

- “expression in any form of a computer program”
  - Art. 1.2 Directive :
    - “*Protection in accordance with this Directive shall apply to the expression in any form of a computer program.*
    - *Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.”*
  - Recital 11 Directive *:*
    - *“to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive”*
  - WCT Art. 2 :
    - “*Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*”

Clone war

- Functionalities : "*the service which the user expects from it*"
  - NO : functionalities are not an expression of a computer program
  - "*To accept that a functionality of a computer program can be protected as such would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development*." [57]
  - Could the nature and extent of a functionality or the level of detail to which that functionality has been reproduced have an impact ?
  - NO : *Art 1.3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection. (see infopaq)*

Clone war

- Programming language :
  - NO : Programming language is not an expression of a computer program
  - "*It seems to me, therefore, that programming language is a functional element which allows instructions to be given to the computer. As we have seen with SAS language, programming language is made up of words and characters known to everyone and lacking any originality. In my opinion, programming language must be regarded as comparable to the language used by the author of a novel. It is therefore the means which permits expression to be given, not the expression itself.*." [71]
  - Recital 11 : "*to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive*." → No *a contrario* reading

Clone war

- Manual :
  - NO : manual is not an expression of a computer program
  - "*The SAS Manuals are technical works which exhaustively document the functionality of each part of each SAS component, the necessary inputs and, where appropriate, the expected outputs. They serve a utilitarian purpose and are designed to give users a large amount of information about the external behaviour of the SAS System. They do not contain information about the internal behaviour of the system*." [103]
  - In principle, ok for WP to take the keywords, syntax, commands and combinations of commands, options, defaults and iterations from the SAS Manuals in order to reproduce them in its program.
  - But if original expression is reproduced (in another manual or in another program), Directive 2001/29 could apply

Clone war

- Data format :
  - YES : data format can be an expression of a computer program
  - "*Like SAS Institute, I take the view that the format of SAS data files is an integral part of its computer program*." [82]
  - BUT they are also "interfaces" which were used by WP to "*achieve the interoperability of the independently created computer program*"
  - Article 6 : decompilation
  - OK to copy if :
    - the reproduction is confined to the parts of the original program which are necessary in order to achieve interoperability
    - there is an absolute necessity to reproduce [87]
    - any contractual provisions contrary to Article 6 shall be null and void
    - Opinion AG gives very little guidance

Clone war

- Conclusions :
  - Do the clones win the war ?
  - Very good chances on the principles
  - The CJEU may “fine-tune” the reasoning, e.g. on idea/expression or decompilation
  - BUT as always :
  - “*It will be for the national court to examine whether, in reproducing, WPL has reproduced a substantial part of the elements of the first program which are the expression of the author’s own intellectual creation*.”

Exhaustion of rights

- Principles :

  - Art. 4.1. : "*the exclusive rights (…) include the right to do or to authorise: (…) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.*"

  - Art. 42. : "*The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*"

Exhaustion of rights

- Usedsoft GmbH

  “*DON’T THROW YOUR MONEY OUT THE WINDOWS.*
  Save up to 50 % with used software.
  As one of the leading companies, we have excellent connections with users in the international arena as well as with liquidators. That is why you get “used” software from nearly all application fields and manufacturers at usedSoft: from Microsoft to Novell, and many more as well.
  But that’s not all: you can also get rid of your unused licenses to generate additional income – for example, when you reduce your staff, switch systems or restructure your company.

  Today there are more than 4.000 companies and public authorities in place for which usedSoft is the first choice for buying and selling used software. ”

Exhaustion of rights

- BUT
  - Software is less and less “distributed” in physical copies (DVD, CD)
  - It is “downloaded” from the Internet
- UsedSoft “resold” a copy of Oracle downloaded from the Oracle website
- UsedSoft had a notarized statement from the original licensee that :
  - he was the lawful holder of the licenses,
  - he had paid the purchase price in full
  - he no longer used the licensed programs.

Exhaustion of rights

- Oracle's license expressly states that it is "non-transferable"
- Oracle initiated proceedings for copyright infringement
- Won in first instance before the Munich Regional Court
- Won in appeal
- Bundesgerichtshof referred questions to the ECJ on 14 March 2011
  - "*is the right to distribute a copy of a computer program exhausted when the acquirer has made the copy with the rightholder's consent by downloading the program from the internet onto a data carrier?*"

Exhaustion of rights

- Concept of “distribution” was initially understood as implying “physical” copies (software on physical support)
- Performance rights are not exhausted (CJEU, 18/03/1980, C-62/79 - Coditel / Ciné Vog Films)

- BUT, if the concept of “physical” copies made sense in 1991… it does not correspond anymore to the economic reality….
- Nothing in the text prevents the Court from considering an “evolutive” interpretation (download = distribution)

Exhaustion of rights

- Otherwise, by deciding on the distribution channel (physical/digital), software vendors could “choose” whether on of the most essential principles of Community law apply
- CJEU, 08/06/1971, C-78/70 -Deutsche Grammophon

  “If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.

  That purpose could not be attained if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States.”

Exhaustion of rights

- Strong pressure from right owners
- Potential impact on all copyrighted works (iTunes etc…).
- IPO and other trade associations are “lobbying” Member States to force interventions
- Situation in the US : US Court of Appeals (9th Circuit – 10/09/2010)
  - a license is not a “sale” → first sale doctrine does not apply
  - Autodesk may stop someone from re-selling second hand copies of its software

Autodesk