Copyright protection of computer software

Recent case law

5 February 2013

Legal framework

- Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

  - First harmonization initiative for copyright

  - "*Whereas <u>certain differences</u> 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 <u>could well become greater as Member States introduce new legislation on this subject</u>*" (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)

- CJEU 22 December 2010, case BSA (C-393/09) : GUI is not protected under Directive 2009/24/EC

  - *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]

Legal framework

- Two ECJ judgements in 2012 :

  - C-406/10 (SAS Institute v World Programming) of 2 mai 2012

    - Reproduction by "emulation"

  - C-12/10 (UsedSoft v Oracle) of 3 July 2012

    - Right to resale (exhaustion)

C-406/10

- Two pages of questions on the Software Directive

- Very important issues raised for the first time before the CJEU

- "No ... but ..." decision

- High Court of Justice (UK) 25 January 2013

C-406/10

- 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 ("scripts") are written in "SAS" Language.

    - If a user wants to change system, it will have to re-write its applications in another language.

- Facts

    - World Programming created World Programming System (WPS), which is an alternative to SAS System (or an "emulator")

    - 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

    - Principle : "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

C-406/10

- Are an expression of a computer program :
  - the functionalities,
  - the programming language
  - the formats of data files
  - the content of the user manual ?

C-406/10

- "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.*"

  - CJEU 22 December 2010, case BSA (C-393/09) *: GUI is not protected under Directive 2009/24/EC does not enable the reproduction of that computer program*

C-406/10

- 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.*" [40, referring to Opinion AG, 57]

  - "*the main advantage of protecting computer programs by copyright is that such protection covers only the individual expression of the work and thus leaves other authors the desired latitude to create similar or even identical programs provided that they refrain from copying*" [41, referring to point 3.7 of the explanatory memorandum]

C-406/10

- Programming language & data format:

  - NO : "*these are elements of that program by means of which users exploit certain functions of that program*" [42]

  - Language : clarified by Opinion AG (which seems to have been followed): "*programming language is a <u>functional element which allows instructions to be given to the computer</u>. 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, <u>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</u>.*" [71]

  - Data format : Court did not follow AG opinion on files format : "*Like SAS Institute, I take the view that the format of SAS data files is an integral part of its computer program.*" [82]

C-406/10

- Programming language & data format:

    - But… there would be infringement if a third party were

        - to procure the part of the source code or the object code relating to the programming language or to the format of data files used in a computer program, and

        - to create, with the aid of that code, similar elements in its own computer program [43]

        - … which was not the case here…

    - But… those elements could be protected by Directive 2001/29 if original

        - Opinion AG : *"As we have seen with SAS language, programming language is made up of words and characters known to everyone and lacking any originality."* [71]

C-406/10

- ## Manual :

  - NO : manual is (obviously?) not an expression of a computer program

  - Clarified by Opinion AG (which seems to have been followed):"*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, WP may 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 [66].

  - But if original expression is reproduced (in another manual or in another program), Directive 2001/29 could apply [67-69]

High Court of Justice (UK) 25 January 2013

- Functionalities : No… cf ECJ

- Programming language & data format: too late for SAS to claim that they could be covered by Directive 2001/29

- Manuals :

  - Manual to program : no

  - Manual to manual : yes, in part :

    - *WPL went further than merely copying the ideas etc. described in the SAS Manuals.(…)*

    - *I consider that WPL substantially reproduced the language of the SAS Manuals even though its policy was not to do so.*

    - *Applying the test laid down in Infopaq, namely whether the parts which have been reproduced express the intellectual creation of the authors of the SAS Manuals, I conclude they do.*

High Court of Justice (UK) 25 January 2013

- Manuals :

  - *"Although they tried to avoid describing the functions in the same language, they did not succeed in avoiding the use of very similar language."*

	SAS Institute, Inc.	World Programming Limited	
	CALL SCAN Routine	**CALL SCAN**	
A.	**q or Q** ignores delimiters that are inside of substrings that are enclosed in quotation marks. If the value of the *string* argument contains unmatched quotation marks, then scanning from left to right will produce different words than scanning from right to left.	**q or Q** ignores delimiter characters that are enclosed in quotation marks.	A.
B.	**r or R** removes leading and trailing blanks from the word that SCAN returns. *["r or R" description taken from html version of SAS 9.2 Language Reference Dictionary at support.sas.com]*	**r or R** trims leading and trailing blanks from the word that SCAN returns.	B.
C.	**s or S** adds space characters to the list of characters (blank, horizontal tab, vertical tab, carriage return, line feed, and form feed).	**s or S** adds whitespace characters to the list of delimiters	C.
D.	**t or T** trims trailing blanks from the *string* and *charlist* arguments.	**t or T** trims trailing blanks from the and arguments	D.
E.	**Tip:** If you want to remove trailing blanks from just one character argument instead of both character arguments, then use the TRIM function instead of the CALL SCAN routine with the T modifier.		E.
F.	**u or U** adds upper case letters to the list of characters.	**u or U** adds upper case letters to the list of delimiters	F.
G.	**w or W** adds printable (writable) characters to the list of characters.	**w or W** adds printable characters to the list of delimiters. The printable characters are all characters except the control characters	G.
H.	**x or X** adds hexadecimal characters to the list of characters.	**x or X** adds hexadecimal digits to the list of delimiters	H.

C-406/10

- Conclusions : Did the clones win the war ?

  - Yes on the "technical part" (Directive 2009/24) :

    - Pretty clear that copying the functionality, language and data files of another computer program where there is no access to the source cannot amount to copyright infringement

  - Less certainty on the "creative" part (Directive 2001/29) :

    - In particular for the manuales, it seems that there is a need not only "not to reproduce" but also "do it differently"

    - Probably because access to the manual is demonstrated (unlike the source code)

C-128/11

- <u>Usedsoft GmbH</u>

    "*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."

C-128/11

- Principles :

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

    - Art. 4.2. : "*The **first sale** in the Community of a copy of a program by the rightholder or with his consent <u>shall exhaust the distribution right</u> within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*"

C-128/11

- ## Not disputed :

  - If you "buy" a software on a CD-Rom... you can "resell" it without the authorisation of copyright owner

- ## BUT

  - Software is less and less "distributed" in physical copies (DVD, CD)

  - It is "downloaded" from the Internet in "85% of the cases"

  - ## Indeed, upon "resale" of the "software" on UsedSoft, the user had to download a "fresh" copy of Oracle <u>from the Oracle website</u>

C-128/11

- UsedSoft had a notarized statement from the original licensee that :

    - he was the lawful holder of the licenses (up-to-date)

    - he had paid the purchase price in full

    - he no longer used the licensed programs

- But, Oracle's "license" expressly stated that it is "non-transferable" right:

    - *'With the payment <u>for services</u> you receive, exclusively for your internal business purposes, for an unlimited period <u>a non-exclusive non-transferable user right free of charge</u> for everything that Oracle develops and makes available to you on the basis of this agreement.'*

C-128/11

- Oracle initiated proceedings for copyright infringement

- Won in first instance before the Munich Regional Court (Landgericht München)

- 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?"*

C-128/11

- *"The first sale in the Community of a copy of a program"* is a Community law concept which must be given an independent and uniform interpretation throughout the European Union [38-41]

- The Court looks at the entire relationship between Oracle and its users :

  - « License Contract » gives a right for an unlimited period of time

  - The user may then download the software for free from Oracle website

  - « it must be considered that those two operations likewise involve (…) the transfer of the right of ownership of that copy. » [47]

- Article 4.2, by referring without further specification to the 'sale … of a copy of a program', « *makes no distinction according to the tangible or intangible form of the copy in question.* » [(56]

C-128/11

- « *The on-line transmission method is the functional equivalent of the supply of a material medium.* » [61]

- BUT, there are boundaries

  - **No further use** : the on-line transmission implies that the seller « make his own copy unusable at the time of its resale », in order to avoid infringing the exclusive right of reproduction of a computer program which belongs to its author. [70]

  - **No division** : the user could not « *divide the licence and resell only the user right for the computer program concerned corresponding to a number of users determined by him* » [69]

  - **No resale of extensions** : The acquisition of additional user rights does not relate to the copy for which the distribution right was exhausted… it is intended solely to make it possible to extend the number of users of the copy which the acquirer of additional rights has himself already installed on his server. [71]

C-128/11

- Oracle argued that it could be extremely difficult to verify that the first the original acquirer has not made copies of the program which he will continue to use after selling his material medium

- ECJ : This is not relevant for the interpration of the law

  - Oracle can still decide to sell only on CD-Rom / DVD

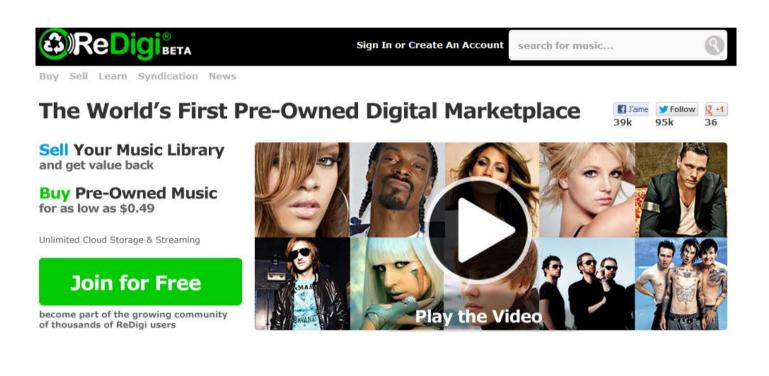 - Oracle may also use technical protection measures to ensure this, such as product keys [85-87]

In the US ?

- US Court of Appeals : Vernor v. Autodesk (9th Circuit – 10/09/2010)

  - a "click wrap" license is not a "sale" → First Sale doctrine does not apply

  - US Supreme Court denied petition for certiorari in October 2011

  - Autodesk may stop someone from re-selling second hand copies of its software

Exhaustion, what's next ?

- Next steps : what is the impact on all copyrighted works other than computer programs (iTunes etc…).

Exhaustion, what's next ?

Breaking news (Sept. 2012) :
Bruce Willis to fight Apple over right to
leave iTunes library …. (not even true)

Exhaustion, what's next ?

- But resale of "tunes" is now becoming a business

Exhaustion, what's next ?

- The solution may be different because the legal framework is different : Directive 2001/29 :

  - Recital 28 : « *Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article.* »

  - Recital 29 : « *The question of exhaustion does not arise in the case of services and on-line services in particular.* »

  - Article 4.2. « *The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.* »

  - Article 3.3 : « *The right of communication to the public shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.* »

In the US ?

- U.S. Copyright Office : "*the tangible nature of a copy is a defining element of the first-sale doctrine and critical to its rationale*."

- Capitol Records sued ReDigi in New York Federal Court in January 2012 (contributory infringement)

- Preliminary injunction was denied and the continues on the merits...

- But even if we first have a final decision in the US... The EU solution may be different.

What's on the ECJ's agenda ?

- After graphical interfaces, clones and resellers…

- The « technological protection measures »

- Reference for a preliminary ruling from the Tribunale di Milano on 26 July 2012 - Nintendo v PC (C-355/12)

- Article 6.3 Directive 2001/29: "technological measures" means *any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright*

- Article 6.2. : Member States shall provide adequate legal protection against the manufacture, import, distribution, sale etc... of means to circumvent any effective technological measures.

What's on the ECJ's agenda ?

- BUT PC Box argues that :

  - the purpose of its product is to ensure interoperability of Nintendo equipment with games independently developed by third parties (ie, so-called 'homebrew' applications)

  - Nintendo's purpose is not so much to protect its games against unlawful copying … but to lock up the use of equipment

- Recital 48 : "*Such legal protection should respect proportionality and should not prohibit those devices or activities <u>which have a commercially significant purpose or use other than to circumvent the technical protection</u>*."