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THE LEGAL PROTECTION OF COMPUTER SOFTWARE IN THE EEC COUNTRIES

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Introduction

This paper will summarize current legal protection afforded to computer software in the various Member States of the European Economic Community (the "E.E.C.").[1] Since, copyright laws are, at present, the primary means for protecting computer software in such countries, Section I contains a general discussion of copyright laws as applied to software in the E.E.C. Section II contains an overview of the laws of individual E.E.C. Member States. In Section III, other possible means of protection of software in the E.E.C., such as patent protection, contractual protection and unfair trade practices laws are discussed.

I. Applicability of European Copyright Laws to Software

As in other parts of the world, there have been many discussions over the past few years in Europe on what should be the most appropriate legal vehicle to protect computer software. The alternative solutions were the following: either the application of copyright law or patent law or the enactment of a specific body of law ("sui generis" protection).

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1. Current Member States of the E.E.C. are the following: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, The United Kingdom.

Because of the technical character of software, patent law seemed, a priori, to be the most natural form of protection. However, there were two major impediments against protection under patent law. First, because of its intangible character, software often does not satisfy certain essential legal requirements of patentability such as the inventiveness criterion pursuant to which only industrial inventions, i.e. those which manifest themselves in some physical form, are patentable. The European Patent Convention of October 5, 1973 explicitly excludes in its article 52(2)(c) the patentability of computer software. This provision is reflected, to various extent, in national legislation of the EEC countries. Moreover, there was much opposition in the software industry to the patent solution since it involves costly and lengthy procedures and the disclosure of the patent applicant as well as of its invention. As a result, European commentators and judges have found patent law to be inapplicable and inappropriate as a means of computer software protection subject to certain exceptions (see Section III(a) hereafter).

Another possibility to solve the problem of software protection was to create a specific body of law adapted to the characteristics of software. This idea has not gained many adherents because (i) it would have probably taken too much time while it was urgent to give some appropriate protection to the fast-growing European software industry and (ii) it would not have afforded international legal protection through existing international conventions like the patent or copyright conventions.

As a result, the pragmatic solution was to rely upon existing copyright laws. The three major arguments against the suitability of European copyright laws to software protection have been, at the time of this writing, addressed and answered by a majority of commentators and court decisions. The prevailing view is that (i) the fact that software has no aesthetic function does not preclude the applicability of copyright laws since other works without any aesthetic character such as technical books or drawings have always been copyrightable; (ii) the fact that software is primarily machine-readable rather than human eye readable is not different from music recorded on a tape which is also capable of copyright protection; (iii) the long duration (50 or 70 years) of protection afforded by copyright is not incompatible with the often short life of software since there are other copyrightable works which have a very short duration (e.g. light music). Furthermore, the copyright solution was supported by the example of foreign countries such as Japan, the United States and Australia.

Accordingly, most leading commentators and influential judges and other judicial officials favor copyright protection. Some countries have already amended their copyright legislation to explicitly mention software among the copyrightable works. Other countries are presently considering to do so.

The following is a brief summary of basic principles of European copyright laws which is worth keeping in mind when considering the complicaton of copyright laws to software in individual E.E.C. member states in Section II.

As in the United States, under copyright laws of the E.E.C. countries, copyright protection is provided to original works i.e. works being the result of the author's own intellectual efforts. Unlike in the United States copyright protection is not subject to any formalities like deposit or indication of copyright signs (such as ©)[2] The protection normally lasts for 50 years (in Germany, it is 70 years) from the death of the author if he is a natural person or from its creation if he is a legal person. The copyright owner is normally the natural person being the author of the work unless copyright has been assigned by contract e.g. to his employer. Under Continental laws (i.e. E.E.C. countries laws excluding U.K. and Irish law), copyright does not only provide economical rights on the work (e.g. right to exploit it through publication) but also include "moral rights" giving to the author the right to divulgate his work only when he desires to do so and to repeal or withdraw it after divulgation. Copyright laws generally provides for rapid remedies in the event of infringement of copyright such as conservatory seizure of infringing materials and criminal action against a fraudulent or malicious infringer. Copying for private use is generally not considered as infringement of copyright.

Although E.E.C. Member States copyright laws are based on the above-mentioned common principles, they have developed divergently and they are differently applied to software. Section II

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2. However, in order to secure international protection by virtue of international copyright conventions, there must sometimes be shown the © symbol followed immediately by the year in which the work was first published and the name of the copyright owner. Failure to put these indications in a country which has adhered to the Universal Copyright Convention but not to the Berne Copyright Convention (see hereafter) may result in losing copyright protection in the states of the former category.

contains a summary of copyright laws as applied to software in various Member States of the E.E.C.

II. Copyright Laws as Applied to Software in the E.E.C. Member States

Among E.E.C. Member States France, Germany and The United Kingdom have amended their copyright legislation in order to mention explicity software among the works susceptible of attracting copyright protection. Other countries (Denmark, The Netherlands, Italy and Spain) are currently considering to do so. Only Greece has expressed reservations as to the application of copyright laws to computer software.

a. Belgium

No statute exists in Belgium specifically extending copyright protection to computer software nor does caselaw provide specific guidance. However, most leading authorities on the subject are now of the view that copyright protection is available not only to users manuals and other auxiliary documents describing the computer program but also to the "source code"[3] and the "object code"[4] forms of the program. In order to be entitled to copyright protection, a computer program should, as any other copyrightable work, be original. The originality test will be satisfied if it is found that the program express the personality of its author. This will be the case if another programmer had to write the program, he would have followed a different way. Under Belgian copyright law, copyright on a work created by an employee does not belong to the employer if it has not been assigned by the former to the latter.

The remedies available to the copyright holder in the event of infringement are the following:

(i) Criminal action: (Art. 22-27 of the Law of 1886 on Copyright): upon a complaint lodged by the copyright holder, a "malicious or

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3. Source code is written in a problem-oriented language, readable by human beings but not directly executable by a computer.

4. Object code is the machine-readable converted form of the program consisting of a series of low and high tension impulses given by a computer.

fraudulent" infringement of copyright, as well as the sale of any infringing materials, will be prosecuted as constituting counterfeiting. If the counterfeiting is established to exist, the infringer will be subject to fines and imprisonment, and the confiscation of all infringing materials as well as of the equipment and apparatus used in connection with the counterfeiting, will be ordered by the Court. It should also be noted that in a recent decision the Court of Appeals of Antwerp[5] held that software is susceptible of theft and subject to corresponding criminal sanctions.

(ii) Conservatory seizure of infringement materials (Art. 1481-1488 of the Judicial Code): Concurrently with the criminal proceedings described hereabove, and, generally, if no such proceedings are commenced (for instance in case the infringement is not deemed to be malicious or fraudulent), the holder of a copyright may proceed with the Judge of Seizures in order to obtain the appointment of one or more experts with as mission to investigate, describe and list all equipment, tools and reproduction techniques used in connection with the infringement, as well as of all materials resulting thereon. This procedure has been successfully used on several occasions in respect of software.

(iii) Civil action for indemnification (Art. 1382 of the Civil Code):
The proceedings described under (i) and (ii) hereabove will generally be resorted to by a copyright holder in order to obtain the necessary evidence in support of a separate legal action for indemnification of the damages incurred as a result of the copyright infringement.

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5. Court of Appeal of Antwerp, 13 December 1984, Rechtskundig Weekblad, 1985-1986, 244 et seq.

Belgium is a country[6] which has adhered to both the Universal Copyright Convention[6] and the Berne Copyright Convention[7]. Foreigners from other signatory countries of these conventions are therefore entitled to the same protection as Belgian nationals subject to reciprocity.

b. France

In France, the Law of July 3, 1985[8] has added software to the works entitled to copyright protection under the Copyright Act of March 11, 1957. Consequently, software is now definitely regulated under the provisions of the Copyright Act of 1957 subject to certain derogations which have been provided for in the Law of 1985.

Such protection is not subject to any formality such as deposit of the work. However, it should be noted that a voluntary deposit with either a private institution or the National Institute of Industrial Property or a notary might facilitate the proof of the identification of the author of the software and the date of its creation.

Copyright protection is conditioned upon compliance with the only requirement that the work is original. In this respect, the French Supreme Court has held in its decision of March 7, 1986[9] that software is to be considered as original if the author can prove that "he made a personal contribution beyond that of effecting an automatically logical step and that the realization of this effort resided in an individualized structure". Authors

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6. Universal Copyright Convention done at Paris July 24, 1971, hereafter referred to as the "Universal Copyright Convention".

7. International Convention for the Protection of Literary and Artistic Works, done at Berne in 1886 revised at Stockholm in 1967 (hereafter referred to as the "Berne Copyright Convention").

8. Law No. 85-660 of July 3, 1985 on Author's Rights and on the Rights of Producers of Phonograms and Videograms and Audiovisual Communications Enterprises, French Official Gazette of July 4, 1985.

9. Babolat Maillot Witt v. Pachot, Droit de l'Informatique, 1986, No. 2, at 80.

are of the opinion that the originality requirement is, on the basis of the above-referenced Supreme Court decision, to be interpreted as a minimum threshold requirement unlike in Germany where it has to be highly creative (see hereafter)[10].

The specific rules which are laid down in the Law of 1985 in order to adapt the Copyright Act of 1957 to the characteristics of software are essentially as following.

Copyright protection of software developed by an employee is in principle granted to the employer. Art. 45 of the Law of 1985 states in this respect that: "Unless otherwise stipulated, software created by one or more employees in the exercise of their duties shall belong to the employer together with all the rights afforded to authors".

Pursuant to Art. 49 of the Law of 1985, software may be assigned for a lump sum price. This is an exception to the principle stated by the Copyright Act of 1957 pursuant to which the author should be compensated in proportion with the success of his work.

With respect to private copying, the Law of 1985 is more restrictive than the Copyright Act of 1957 since the former prohibits in its Art. 47 any copy of software unless copy for back-up purposes. Art. 47 further provides that "any use of the software not expressly authorized by the author or his successors in title shall be subject to the sanctions laid down by the (Copyright Act of 1957)"1.

The Law of 1985 restricts the term of protection of software to 25 years from the date of its creation.

With respect to remedies in the event of infringement, the Law of 1985 lays down that an infringement seizure ("saisie contrefacon") shall be carried out under an order issued on request by the presiding judge of the First Instance Court who may also authorize distraint ("saisie reelle"). The petitioner may designate his own expert to assist in the seizure. Furthermore, a descriptive seizure of the infringing software (e.g. through a copy of the software) shall be carried out by a police

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10. See J. Huet, The Protection of Software: Past Practice, Existing Law and Future Difficulties, French Report presented at the Conference on the "International Legal Protection of Computer Software: Past Practice and Future Policy" Stanford, July 24-26, 1986.

commissioner on simple request by the author of the infringed software.

Protection of foreigners' rights on software in France is conditioned upon reciprocity. Art. 51 of the Law of 1985 provides that: "Subject to international conventions, foreigners shall enjoy in France the rights afforded under this title on condition that the law of the state of which they are nationals or on the territory of which they have their place of residence, their registered offices or an effective establishment affords its protection to software created by French nationals and by persons having in France their place of residence or an effective establishment".

c. Germany

The Law of June 24, 1985[11] has amended Art. 2, Para. 2, 1 of the German Copyright Act by adding the words "computer programs" to the list of works eligible to copyright protection. Computer software is therefore subject to the general rules on copyright with the only exception that the Law of 1985 has excluded computer software from the applicability of Art. 53 of the Copyright Act which provides that private copies do not require the authorization of the copyright owner. Accordingly, any reproduction of protected computer software, including for private and back-up purposes, is deemed to be a copyright infringement unless it has been authorized by the copyright owner.

In order to be granted copyright protection, software should meet the general requirement of originality contained in Art. 2, Par. 2 of the Copyright Act. The question of the originality of a computer program has been discussed in the Federal Supreme Court decision of May 9, 1985[12]. According to the Supreme Court, the originality test will be satisfied in respect of computer software only if the software represents an individual, original and intellectual creative achievement i.e. that it exceeds clearly and significantly the ability of an average programmer. As pointed out by a leading authority in this area who commented on

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11. Law amending provisions in the field of copyright of June 24, 1985, Bundesgesetzblatt, No. 33 of June 27, 1985 at p. 1137 et seq.

12. Case Inkasso-Programm, GRUR, 1985, at p. 1041 et seq.

the Supreme Court decision[13], "neither the length nor the cost of a program are of importance, nor is the fact that several programmers given the same task would develop different programs". Pursuant to most legal writers[14], the outcome of the above-referenced Supreme Court decision is that the majority of computer programs are probably not protected under German Copyright Law.

To the extent that the originality test is satisfied, computer software will benefit automatically (i.e. without any formality) from legal protection for a period of 70 years. According to caselaw, copyright on software developed by an employee in the context of his employment assignments is owned by his employer by virtue of an implicit transfer of rights[15].

The remedies available to the copyright owner in case of infringement are those which are provided for in the Copyright Act for all protected literary works.

Protection of foreigners' rights in software in Germany is conditioned upon reciprocity. Foreigners from countries which have adhered to the Berne Copyright Convention or to the Universal Copyright Convention and which also protect computer software, will be entitled to copyright protection in Germany in the same manner as German nationals.

d. The Netherlands

Although there is so far no statute in The Netherlands specifically extending copyright protection to computer software[16], the

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13. Dr. A. Dietz, Copyright for Computer Programs: Trojan Horse or Stimulus for Future Copyright Systems? The German Example. Paper delivered at the Conference on the International Legal Protection of Computer Software: Past Practice and Future Policy. Stanford, July 24-26, 1986.

14. See Dr. A. Dietz, op. cit. and G. Wurtenburger, The Protection of Computer-software in the Federal Republic of Germany, Computer Law & Practice, May/June 1986, at p. 166-168.

15. Case Statistik Programm, BAG (1984) GMUR at p. 429 cited by G. Wurtenburger, op. cit.

16. Such legislation is presently under consideration.

weight of the judicial authority and caselaw is to the effect that the Dutch Copyright Act of 1912 as amended in 1972 is applicable to computer software.

The protection is granted to original works without any formality for a period of 50 years. Dutch courts have applied the originality test to computer software in the following manner. The President of the District Court of Assen[17] ruled that copyright protection was available to a computer program intended to calculate the optimum composition of livestock feeding because the problems raised in the development required one year and a half of work by a highly qualified programmer. The District Court of Arnhem held in its decision of February 21, 1985[18] that a word processing program was original because its programmer had to make a certain number of choices taking into account the functions to be produced and the implementation of the program.

Under Art. 7 of the Dutch Copyright Act, copyright on a work created by an employee while on duty belongs to his employer. Art. 16B of the Copyright Act allows the making of copies for "private use" i.e. "for the sole purpose of the personal practice, study or use of the person who makes the copies or order the copies to be made exclusively for himself". This may be construed as allowing back-up copies of a computer program.

In case of infringement of copyright, the Copyright Act provides for an accelerated procedure whereby a judicial decision to obtain seizure of infringing materials may be obtained within a few days provided the plaintiff can establish the urgency of the case[19]. The Copyright Act also provides for civil remedies by way of damages and for criminal sanctions.

The Netherlands have adhered to the Berne Copyright Convention and the Universal Copyright Convention. Foreigners are therefore entitled to national treatment upon condition of reciprocity.

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17. Rechtbank Assen, January 10, 1984, Droit de l'Informatique, 1984, p. 25.

18. Rechtbank Arnhem, February 21, 1985, Computerrecht, 1985, p. 27.

19. See Art. 31 of the Copyright Act of 1912.

e. The United Kingdom

The Copyright (Computer Software) Amendment Act 1985 (the "Act") states that the Copyright Act 1956 shall apply to a computer program as it applies in relation to literary works. The Copyright Amendment Act 1985 also specifies that storing a work in a computer is deemed to be both a fixation that will procure copyright protection ("reduction in a material form"). The Act also provides that converting a version of a computer program into or out of a computer language or code, or into a different computer language or code is an adaptation of the program and should therefore be deemed to be an infringement of copyright when done without authorization of the copyright owner.

As being listed among literary works eligible to copyright protection, a computer software should prove to be original in order to attract copyright protection. Under the United Kingdom copyright law (like under other Anglo-Saxon copyright systems), the originality test is more easily satisfied than in Continental Europe systems of law in the sense that there is no requirement of a certain intellectual standard. Only works which are themselves copies are not deemed to be original.

Copyright on computer software created by an employee in the course of his employment under a contract of service belongs to the employer.

Private copies are permitted under the fair dealing defense contained in Section 9(1) of the Copyright Act 1956. Accordingly, unauthorized copy of a work for research or private study does not constitute a copyright infringement.

In respect of remedies, the Copyright Amendment Act 1985 provides that "(w)here an infringing copy of a computer program consists of a disc, tape or chip or of any other device which embodies signals serving for the impartation of the program or part of it, Sections 21 to 21B of the Copyright Act 1956 (offenses and search warrants) shall apply in relation to that copy as they apply in relation to an inquiring copy of a sound recording or cinematograph film".

Since the United Kingdom is a state member of both the Berne Copyright Convention and the Universal Copyright Convention, computer programs authored by nationals of other contracting countries are, in principle, protected under U.K. law upon condition of reciprocity.

f. Other Countries

None of the other E.E.C. Member States (Denmark, Greece, Ireland, Italy, Luxembourg, Portugal and Spain) has adopted specific legislation to protect computer software. However, most of them are considering to do so and are in favor of copyright protection. Only Greece has expressed reserves as to the suitability of copyright protection.

III. Other Means of Legal Protection for Computer Software

Although there is a general trend in the E.E.C. towards protection of computer software under copyright laws, there are still other ways to obtain such protection under certain circumstances. Those other means of legal protection are, essentially, protection under patent and unfair competition laws and contractual protection.

a. Patent Law

The European Patent Convention of 1973 expressly excludes in its Art. 52(2)(c) computer software "as such" from patentability. This provision is reflected in the national laws of most E.E.C. Member States.

Notwithstanding this exclusion it is still possible to obtain national or European patent for computer software to the extent that a computer program is part of an industrial process which is itself patentable. This has been confirmed by various court decisions. For example the Court of Appeals of Paris in the Schlumberger case[20] decided that an oil drilling process could not be deprived of patent protection on the sole ground that certain steps of the procedure are directed by a computer run by a software.

The European Patent Office has recently issued new Guidelines relating to the examination of computer-related inventions to the effect of interpreting the exclusion of computer programs "as such" from patentability as strictly as possible.

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20. Court of Appeals of Paris, June 15, 1981, Dalloz I.R., 1982, p. 231 with comments by Prof. Huet. See also, Prof. Huet, op. cit., p. 13.

b. Unfair Trade Practices Laws

Most E.E.C. Member States have laws prohibiting unfair trade practices. Those laws can, in principle, be invoked by the owner of computer software against any competitor attempting to utilize the software or to gain access to the know-how relating thereof by means of unfair business practices such as the diversion of personnel or the inducement of such personnel to breach their duties of confidentiality vis-a-vis their employer. National laws generally provide for injunctive relief against such unfair competitors.

c. Contractual Protection

With regard to parties which are in privity of contract, the legal protection of software can also be achieved contractually. The fact that the legal systems of the E.E.C. Member States now recognize that software may be subject to ownership through copyright clearly validates clauses within computer contracts (software license agreements, software development agreements, etc.) whereby the owner of the software imposes to the other party limitations as to the use of the software and recognition of the owner's right.

Conclusion

The general trend in the E.E.C. Member States is to protect computer software under existing copyright laws. This solution has the advantage of providing software with a protection which is not subject to the fullfillment of any formalities. It also allows copyright holders to benefit from the existence of international copyright conventions.

However this solution also raises some difficulties due to the peculiarities of computer software compared with works which are traditionally protected by copyright. For example, the originality test raises difficulties when it has to be applied to software and the very long duration of protection afforded by copyright laws seems unappropriate.

Furthermore, since copyright legal systems of the various Member States of the E.E.C., although based on common principles, have developed divergently, there is no uniform protection throughout the E.E.C. The Commission of the European Communities has announced the publication in 1986 of a "Green Paper" which will consider the opportunity to take legal initiatives at a E.E.C. level with regard to the harmonization of copyright laws.