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SOFTWARE PROTECTION AGAINST THIRD PARTIES IN BELGIUM

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I. INTRODUCTION

On June 30, 1994, Belgium enacted a specific statute ("Software Act") granting legal protection to computer programs. This Act incorporated the May 14, 1991 Council Directive 91/250/EEC on the legal protection of computer programs, into national law. At the same time, the general act concerning copyright and associated rights (replacing the Copyright Act of March 22, 1886) was passed. Belgium is the only country in Europe that has incorporated Directive 91/250/EEC into a specific law that is separate from copyright law. This separation between the Copyright Act and the Software Act is practical and equally justified because computer programs are works of a special nature and deserve a sui generis[1] copyright protection. In contrast, many other countries, such as the United States, Japan, Germany, France and the United Kingdom, have only amended their existing copyright laws in order to include software among protected works.

Courts must consider both the Copyright Act and the Software Act when analyzing computer program copyright protection because computer programs are comparable to literary works, protected by the Copyright Act. This article analyzes the main provisions of the Software Act. Reference will also be made to the Copyright Act wherever that act is applicable. Further, the protection of computer programs through the Software Act does not preclude other methods of protection; computer programs are also protectable through patent, trademark or unfair competition laws, which this article briefly discusses below.

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1. *See* A. Strowel, *Vers un droit d'auteur sui generis: la loi du 30 juin 1994 sur les programmes d'ordinateur*, [Ing.Cons.], 70-87 (1994).

II. THE JUNE 30 1994, ACT ON PROTECTION OF COMPUTER PROGRAMS

A. The Situation Prior to the Specific Act

Computer programs were not within the scope of protection of the former Copyright Act of March 22, 1886. Yet very few court decisions on the merits[2] deal with this lack of protection. The courts in those few cases refer to foreign case law, which has long accepted that software is covered by copyright where the concerned programs constitute original creations. Most Belgian courts hearing attachment cases[3] have always accepted the principle that copyright law protects software as far as descriptive attachments are concerned.[4]

B. The Situation Concerning the Protection of Computer Programs Under the Act of June 30, 1994

The new Software Protection Act is largely inspired by the Directive. However, the Act includes a special feature which is not found in the Directive. The Act expressly refers to Article 6a(1) of the Berne Convention, with regard to the protection of moral rights.

1. *Object of Protection*

The first paragraph of Article 2 of the Software Act grants copyright protection to computer programs, including the preparatory design material, for the programs. Thus, the Software Act treats computer programs as literary works. Article 2, paragraph 2 states that the protection applies to "the expression in any form of a computer program." However, "ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright."

Copyright protection covers all computer program source code, object code and mediums of use, including Read Only Memory. Furthermore, copyright protection extends to the user's manual and other descriptions of the computer program. The only criterion that a court uses to determine whether a program is eligible for protection is the requirement of originality. A court considers a computer program original if the program is the author's own intellectual creation. Copyright pro-

2. *See Pres. Comm. Trib. of Brussels*, [Ing.Cons.] 463 (1985) Trib. Leuven, 5 February 1991, Droit de l'Informatique, 45 (1993); Court of Appeal of Brussels, October 14, 1993, [Ing.Cons] 358 (1993).

3. That is in *"saisie-description"* procedures. This particular type of procedure is comparable to the "Anton Piller Order" in the United Kingdom and will be discussed below.

4. *See generally* Phillipe Péters, *La protection juridique du logiciel*, [Barreau de Charleroi, Faculty of Law of Namur], (1987).

tection also extends to computer interfaces that meet the requirement of originality, although the Software Act does not refer to interfaces.

2. *Ownership of Rights*

i. General Principles

The original owner of both the economic and moral rights in a computer program is usually a private person.[5] However, when a computer program is created by a group of people, they must exercise those rights collectively. According to the Copyright Act, which recognizes the concept of an "indivisible work,"[6] the joint owners exercise the economic and moral rights through a contract. In the absence of such a contract, disputes between the joint owners are dealt with in a court of law. A corporate body can also become the copyright owner of a computer program through a legal transfer: Article 3 of the Copyright Act governs the transfer of a copyright.

ii. Employees

Article 3 of the Software Protection Act also governs the economic copyright ownership of a computer program created by an employee within the scope of his employment under Article 3, the employer is the exclusive transferee of the economic rights to the program, unless otherwise provided by contract or statute. This provision departs from the Copyright Act, which states that the employer is the transferee only upon certain conditions Article 3, Sections (3)1 to (3)3 of the Copyright Act provide that the employee remains the copyright owner, unless otherwise provided by contract or unquestionably transferred.[7]

Vested rights are unaffected by the Software Act, although that Act applies equally to computer programs created before and after its effective date. Consequently, copyrights in computer programs created before August 6, 1994, remain the property of the employees who created them, unless otherwise provided by contract.

iii. Commissioned Works

The ownership of software created by a non-employed designer is dealt with by the Software Protection Act, or by the Copyright Act. As a consequence, according to the general principle of ownership, the de-

5. A. Strowel and J.P. Triaille, *Jurisprudence récente et questions d'actualité en matière de protection des logiciels*, Ing.-Cons., 1993, p. 333.

6. The concept of indivisible work must be seen as a from of joint ownership. Belgian law does not recognise the concept of collective work.

7. C. Schoemann en S. Capiaux, *Le droit d'auteur du concepteur salarié ou non salarié d'un programme d'ordinateur,in Droit de l'informatique: enjeux—nouvelles responsabilités*, Ed. Jeune Barreau de Bruxelles, 1993.

signer remains the copyright owner even though he has handed the material result of his work to his principal,[8] except in the event of contractual transfer of copyright. In the authors' opinion, the latter does not prevent a customer, whose principal has ordered and financed a computer program, from demanding that the sources are returned to him. Indeed, the object of the contract was the writing of the program in source code, the object code being only the subsequent translation made by a computer. As a consequence, the object code must also be returned to the principal, should he so desire.[9]

iv. Computer-Generated Programs

To date no precise indications as to the ownership of rights in programs created with the aid of other programs are available. In the authors' opinion, however, the individual who operated the program that allowed the software in question to be created, will be the copyright owner provided that the software meets the requirement of originality.

3. *Available Rights*

i. Restricted Rights

Article 5 of the Software Protection Act lists the various restricted rights of the copyright owner in a computer program.

a. Reproduction Article 5(a)

The copyright owner has the exclusive right to reproduce the program in any form and for whatever purpose, including for its use.[10] Insofar as loading, displaying, running, transmission or storage of the computer program necessitate a form of reproduction, the latter will only be possible subject to the authorisation by the copyright owner.

b. Translation, Adaptation and Arrangement (Article 5(b))

The rights of the copyright owner include a monopoly over the translation, adaptation, arrangement and any other alteration of a computer program, as well as a monopoly over the reproduction of the program resulting therefrom, without prejudice to the rights of the person who alters the program. When this Article is read together with Article 6a(1) of the Berne Convention which limits the author's right to only prevent

8. *Id.*

9. The President of the District Court of Breda upheld these rules in a judgement of 20 February 1995 (COMPUTERRECHT 1995, at 70).

10. F. Brison and J.P. Triaille, *La Directive CEE du 14 mai 1991 et la protection juridique des programmes d'ordinateur en droit belge*, J.T., 1991, pp. 780-784.

changes to his work likely to prejudice his honour or his reputation, a discrepancy seems to appear between both principles.

c. Distribution rights (Article 5(c))

The copyright owner has an exclusive distribution right to the public, including the rental and lending of the original computer program or copies thereof. No distinction is made between distribution free of charge and distribution for gain, and no exception exists in favour of non-profit public libraries.[11]The copyright owner's right will be exhausted, however, after the first sale in the European Union of a copy of a program by himself or with his consent. The copyright owner will not be able to prevent a copy of his program marketed in the European Union (and, in principle, in the EEA countries) by himself or with his consent from circulating freely within that market, such as being passed on by one user to another, on the understanding that the vendor may not retain a copy of the program sold. This rule concerning the exhaustion of rights is a matter of public policy and cannot, in our opinion, be departed from by contract.

On the other hand, the copyright owner can prevent the importation of programs marketed for the first time outside the European Union. Similarly, although subject to the application of the principle of reciprocity contained in Article 79(3) of the Copyright Act, it is possible to contractually prevent products lawfully marketed in the European Union from being exported outside its borders.

ii. Exceptions to the Restricted Acts

a. Fair Use of the Program Article 6, Paragraph 1

The reproduction, translation, adaptation, arrangement and any other alteration to a program does not require authorisation from the copyright owner, insofar as these actions are necessary for the use of the computer program by the lawful receiver in accordance with the intended purpose of the computer program, including fair use. It is possible to depart from this exception by contract, although, without making all normal use impossible, as it would deprive the contract of any substance.[12]

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11. However, in accordance with Article 23 of the Copyright Act, exceptions are possible, subject to a fee to be negotiated, by virtue of Article 62 (1). *See supra* note 10, F. Brison and J. B. Triaille.

12. *See* J.P. Buyle, L. Lannoye and A. Willems, *Chronique de jurisprudence: L'informatique* (1976-1986), J.T. 1988, pp. 93-104 and 113-23.

b. Reproduction — Article 6, Paragraph 2

The person having a right to use the computer program may not be prevented from making a backup copy of the program, insofar as it is necessary for use. According to Article 8, this provision is binding and may not be departed from. This exception cannot be compared to the exception concerning copying for private and examination purposes as in the general Copyright Act's Article 22(1) (4), because the exception is not expressly provided for.[13] Moreover, the strict exception in favour of a back-up copy would otherwise become meaningless.

c. Observation and Study — Article 6, Paragraph 3

The person having a right to use the computer program shall be entitled 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. However, that person must be performing the acts of loading, displaying, running, transmitting or storing the program, acts which he is entitled to do conduct. This provision is similarly binding.

d. Decompilation — Article 7

Decompilation is permitted, but only within the strict aim of creating an operable program in the following circumstances to the exclusion of any other purpose such as creating competing programs. The authorisation of the copyright holder is not required where reproduction of the code and translation of its form, within the meaning of Article 5(a) and 5(b), are indispensable to obtain the information necessary to achieve the operability of an independently created computer program with other programs, provided that the following conditions are met:

(a) The acts of reproduction and translation are performed by a person entitled to use a copy of the program, or by a person authorised to do so on his behalf;

(b) The information necessary to achieve operability has not previously been easily and readily available to him;

(c) The acts of reproduction and translation are confined to the parts of the original program necessary to achieve operability.

This Article cannot be applied in such a way as to cause unreasonable harm to the legitimate interests of the copyright holder or conflict with a normal exploitation of the computer program.

e. Other Exceptions

The Directive, which creates specific exceptions for computer programs, does prevent the application of the general exceptions to copy-

13. *See* Brison and Triaille, *supra* note 10.

right, laid down in the Copyright Act. Certain scholars, however, feel that the general exceptions should not apply, since the Directive lays down specific exceptions for computer programs.[14]

In these authors' opinion though, nothing precludes the application of the general exceptions, provided they do not conflict with the exceptions expressly made in respect of such programs.[15]

iii. Moral Rights

Article 4 of the Software Protection Act expressly refers to Article 6a of the Berne Convention, introducing the right to claim authorship and the right to object to certain modifications and other derogatory actions. Although the Directive does not address the issue of moral rights, it does extend application of the general system for literary works to computer programs. As a consequence, because the Copyright Act provides for a more general scheme than the Berne Convention, problems may arise regarding the relationship between the more general Copyright Act and the Software Protection Act's specific exceptions.

4. *Term of Protection*

Article 9 of the Software Protection Act incorporates the goals of Article 2 of the Copyright Act. According to Article 2, copyright in a computer program expires seventy years following the death of the author. In case of an indivisible work, copyright will expire seventy years after the death of the last surviving author. If the work is of unknown authorship (anonymous or pseudonymous works), copyright expires at the end of seventy years after the year in which it is first lawfully made available to the public, provided the author remains unknown during that period of time.

5. *Infringement*

Both the sanctions provided under law and those provided under the Copyright Act will apply in case of infringement Article 10. The remedies in case of infringement of copyright in a computer program are briefly discussed infra.

i. Civil Remedies

Insofar as good faith does not exclude infringement, civil actions may be brought against any infringer or holder of infringing articles.

14. J. CZARNOTA & J. HART, *Legal Protection of Computer Programs in Europe, A Guide to the EEC Directive* 30 (London Butterworths 1991).

15. *See* A. Strowel, *supra* note 1; F. Brison and J.P. Trialle, *supra* note 10.

a. Cease and Desist Action

Article 87 of the Copyright Act has introduced a new action ("Action en Cessation"), allowing any interested party, including companies administering rights of trade or inter-trade groupings with civil personality, to seek an order to cease the impugned acts with the presiding judge of a Court of First Instance. While this action is an action on the merits, it is a very swift procedure. Article 87 provides that the action should be brought and considered as if in urgent proceedings, although no urgency is required and the action will be pursued notwithstanding the possible existence of a criminal action. The presiding judge may, at his discretion, order the judgement to be published and order the handing over of counterfeited articles and tools which have served to commit the infringement.

With a view to obtaining other means of compensation, especially damages, the plaintiff must bring an action on the merits before the ordinary divisions of the Court of First Instance.

b. Interlocutory Proceedings — Action on the Merits

It is always possible to obtain a cessation order from a court within the framework of the ordinary interlocutory proceedings (where urgency is required) and actions on the merits. The orders will generally be accompanied by a penalty upon the infringing party.

c. "Saisie-Description" Procedure

This *ex-parte* type of procedure is comparable to the Anton Piller order under English law. It is possible to quickly and effectively establish proof of an infringement through a description or a seizure of the allegedly infringing products or documents. The procedure is set forth under Articles 1481 through 1488 of the Judicial Code, and is available to most intellectual property right-holders.

The copyright owner may, with permission granted by a court order upon request, have one or more experts appointed by the judge undertake the description of the devices, machines, works, varieties, propagating material and all objects and procedures infringing, as well as of the plans, documents, calculations, writings, plants or part of plants which can reveal the alleged infringement, and the instruments directly used for the manufacturing of the infringing products. The information gathered may, in turn, be used to support an action on the merits.

ii. Criminal Remedies

Article 10 of the Software Protection Act imposes a fine of 100 to 100,000 Belgium franks on persons putting into circulation, or possessing for commercial purposes, a copy of a computer program knowing or

having reason to believe that it is an infringing copy, and on persons putting into circulation, or possessing for commercial purposes, any means whose purpose is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program. The physical media concerned in the infringement may be confiscated upon court order. In addition, any repetition of the infringements concerned will result in imprisonment of three months to two years and a fine of 100 to 100,000 Belgium Franks, or one of these penalties only.

Whenever an infringement on copyright in a computer program also falls within the existing category of criminal offences (e.g., theft of databases through illegal reproduction), it will be sanctioned according to the provisions relating to such crimes as theft, as well.

II. RELATION OF COPYRIGHT IN COMPUTER PROGRAMS TO OTHER RIGHTS

A. Protection of Software as Intellectual Property

1. *Patents*

Where the prior Patent Act of May 24, 1854, did not exclude computer programs from its scope of protection, Article 3(2) of the Patent Act of March 28, 1984, expressly states that computer programs "regarded as such" are not held to be inventions.[16] However, it seems that computer programs have not radically been excluded from patent protection. Indeed, foreign precedent[17] and certain commentators have actually stated that computer programs may be protected by patent in certain circumstances. There is no Belgian case law on this subject.

Although there is no Belgian case law on this issue, Mr. Flamée,[18] a fervent advocate of the possibility of protecting computer programs through patent law, defends this argument. According to Flamée, the present state of the majority of national legislation (complying with the Munich Convention on the European Patent), does not preclude software from patent protection, except in cases where patent protection would result in monopolising the solution to a problem "as such." In his opinion, there are two categories of software, patentable software and software "as such." Of course, in order to be patentable, the computer program must comply with the basic requirements set out in Article 1 of

16. *See* Convention on the Grant of European Patents, 1 B.D.I.E.L. 985.

17. Flamée, *La protection juridique du logiciel in Droit de l'informatique, Enjeux—nouvelles responsabilités*, Ed. du Jeune barreau de Bruxelles, 1993, at 53 and 54.

18. M. Flamée, *Octrooieerbaarheid van software, rechtsvergelijkende studie: België, Nederland, Frankrijk, De Bondsrepubliek Duitsland, Groot-Brittannië, de Verenigde Staten van America en het Europees octrooiverdrag*, Brugge, die Keure, 1985.

the Patent Act: (1) novelty; (2) inventive step; (3) capable of industrial application; and, (4) lawfulness.

2. *Trademarks*

The unlawful reproduction of a computer program, involving the unlawful reproduction of the proprietor's trademark is an infringement by virtue of Article 13 A (1) of the Benelux Trademark Act which provides that:

> Without prejudice to the possible application of ordinary law concerning civil liability, the exclusive right to the mark permits the proprietor to prevent:
>
> a) any use which shall be made for business purposes of the trade mark for products for which the mark has been registered.

The reproduction of software involving the reproduction on the screen or in the user's manuals of a protected trade mark, has been held to be an infringement.[19]

3. *Semiconductor Topographies*

Semiconductor topographies, also commonly named "chips," achieved legal protection under the Act of January 10, 1990, incorporating Directive 87/54 of December 16, 1986 into national legislation. Article 1 of this Act lays down the principle according to which the creator of a semi-conductor topography is granted a temporary, though exclusive right to reproduce and exploit it commercially. The criterion for protection is that the topography is the result of its creator's intellectual effort and is not current in the semi-conductor sector of Article 2.

The rights to a semiconductor topography, created by an employee in the course of his employment, will vest in the employer, unless provided otherwise. The same applies to the commissioner of a semi-conductor product topography, created to order under Article 4. Under Article 9, the protection expires ten years after the end of the year in which the topography was first exploited commercially, anywhere in the world.

The Act further includes provisions concerning the possibility of reverse engineering, analysis and protection of a bona fide purchaser (Art. 10 *et seq.*). It is finally worth indicating that an action based on infringement of topography rights is statute-barred five years from the date on which the act was committed. To date there is no precedent in Belgium dealing with the protection for semiconductor topographies.

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19. Criminal Court of Verviers, 4 Oct. 1989, COMPUTERRECHT, 1992, at 27; Criminal Court of Brussels, 24 June 1993 (unpublished).

B. Unfair Competition

Because computer programs used by companies have a considerable market value, there is an overlap between copyright infringement (counterfeit) and unfair competition.[20] Indeed, the infringer has never had to bear the costs and expenses inherent in producing or purchasing a new program and the unlawful reproduction or distribution of computer programs enable him to market them at a much lower price.

This is a typical case of parasitic competition which falls under the ban imposed by the Fair Trade Practices Act of July 14, 1991. Article 93 of this Act provides that "Any act contrary to fair trading whereby a vendor harms or may cause harm to the trade interests of one or more other vendors is prohibited."

Although before the entry into force of the Fair Trade Practices Act, the presiding judge of the commercial court of Brussels sitting on a cease and desist application, decided in this sense.[21] The court stated that the act of supplying a set of pirated programs free of charge together with computers, distorted the effects of competition by offering customers the free enjoyment of programs, the cost of which would otherwise have pushed up the price of the system. The unscrupulous retailer was found guilty of practices amounting to unfair competition.

IV. CONCLUSION

The new Act on the protection of computer programs seems to give appropriate guidelines for the many unanswered questions of the last few decades. It is clear that the case law will rapidly develop in the forthcoming years. The frantic evolution of software, however, will raise many more questions, for which an answer may not always be found in the new Act.

20. *See also* the thorough study by Ivan Verhougstraete in *Les journées du droit d'auteur*, Bruylant, 219 (1989) (providing a good understanding of the relationship between copyright and fair trade practices).

21. Pres. Comm. Trib. of Brussels, 2 April 1990, J.LM.B., 1990, at 260 (with comments by Philippe Péters).