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## LEGAL PROTECTION OF COMPUTER PROGRAMS

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## Legal Framework

- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (this directive repeals Directive 91/250/EEC on the same subject);
- National laws of transposition.

## Protection via copyright

Prior to the directive, the legal protection of computer programs varied greatly throughout the member states in both the terms and condition of it.

It has therefore been decided that the Community's legal framework on the protection of computer programs can in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply.

Article 1 of the directive provides accordingly that "Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works".

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## Which elements are protected?

Protection shall apply to the expression in any form of a computer program.

The term "computer program" includes programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

For the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive. In accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive. In accordance with the legislation and case-law of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright.

In the SAS case, the Court of Justice of the European Union has ruled that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive.

## The terms of protection

When it is decided that the work should be considered as a literary or artistic piece, therefore protected under the Berne Convention, the question of originality will arise. 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.

In respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied.

## Who is the author?

The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.

It is perfectly possible to find different situations, according to the member states concerned. Certain states will limit authorship to individuals consid-





ering that they can only demonstrate originality, where others will prove more flexible in relation to positions of legal persons.

Depending on national legislation, it will therefore organise by contract the transfer of rights to the corporation. This is a typical pattern, especially when a company uses independent programmers. Care should be taken to include in all contracts with suppliers, an assignment clause in favour of the client company. In this case, although not author, the company would be rightholder.

## Employees

Where a computer program is created by an employee 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.

It constitutes an important innovation putting an end to the confusion between member states, in order to guarantee to software companies that the persons they employ will not be able to prevent the exploitation of the software.

However, the definition of an 'employee' may vary between Member States; for example: is a physical person developing software under a sole-proprietary company he created for tax purposes, still an employee? The answer may have very important implications, in a case bankruptcy for example.

As a example, the Belgium Supreme court has ruled on June, 3<sup>rd</sup>, 2010 that the transfer of economic rights to the employer in relation to the computer program developed by its employees, is an exception to the normal regime and should therefore be interpreted restrictively.

## Rights as a rightholder

The exclusive rights of the rightholder shall include the right to do or to authorise:

- a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;
- b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;





- c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.

### **Exceptions relating to the use of software**

In the absence of specific contractual provisions, the acts referred to in points (a) and (b) here above shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

Also, the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

Eventually, 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. In the SAS case, this has been interpreted as meaning that a person who has obtained a copy of a computer program under a licence is entitled, without the authorisation of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that licence and acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program.

It has to be underlined that such exception is limited to the “lawful acquirer”. This means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract. In the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy.

### **Exceptions relating to interoperability**

The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:





- (a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;
- (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and
- (c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

Recital 10 of the Directive provides more details on the definition of interoperability. It says that the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. The parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces". This functional interconnection and interaction is generally known as "interoperability"; such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.

The exception related to interoperability should however be interpreted restrictively.

This is supported notably by a Recital of the Directive providing that "circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs. It has therefore to be considered that, in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorisation of the rightholder. An objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together. Such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program."

In accordance with this Recital, the Directive provides that in accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions related to interoperability may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.



## Technical measures of protection

Software is regularly protected against illegal use by technical measures of protection, built into the software itself or in a separate device. It became necessary to give specific legal status to these measures, but without going so far as to question the exceptions granted to the legitimate user.

That is why the directive states that, while ensuring a correct balance between the rights of the rightholder and those of the user, Member States shall however provide, in accordance with their national legislation, appropriate remedies against a person committing any of the following acts:

- (a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;
- (b) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;
- (c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.

More information on this subject is to be found in the Nintendo case. Although this case relied on the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, a video game is to a large extent a type of computer program (as underlined by the advocate general). In that case, the Court of Justice of the European Union has ruled the concept of an 'effective technological measure', for the purposes of the 2001/29 directive, is capable of covering technological measures comprising, principally, equipping not only the housing system containing the protected work, such as the videogame, with a recognition device in order to protect it against acts not authorised by the holder of any copyright, but also portable equipment or consoles intended to ensure access to those games and their use.

## Competition law

The provisions of this Directive are without prejudice to the application of the competition rules under Articles 81 and 82 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive.





## Used software

According to the Directive, 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.

The objective of the principle of the exhaustion of the right of distribution of works protected by copyright is, in order to avoid partitioning of markets, to limit restrictions of the distribution of those works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned (see, to that effect, Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 14; Case C-61/97 *FDV* [1998] ECR I-5171, paragraph 13; and *Football Association Premier League and Others*, paragraph 106).

In a landmark case, the Court of Justice of the European Union has ruled that this must be interpreted as meaning that the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period.

In other words, the exhaustion of the distribution right concerns both tangible and intangible copies of a computer program, and hence also copies of programs which, on the occasion of their first sale, have been downloaded from the internet onto the first acquirer's computer.

Moreover, the Court has ruled that in the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder's website, that licence having originally been granted by that rightholder to the first acquirer for an unlimited period in return for payment of a fee intended to enable the rightholder to obtain a remuneration corresponding to the economic value of that copy of his work, the second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right, and hence be regarded as lawful acquirers of a copy of a computer program and benefit from the right of reproduction provided for in that provision.

